Supreme Court, U.S.
FILED
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No.
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JUDGE RICE,

pro se Plaintiff/Petitioner

v.

CITY OF OAKLAND
and
STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Defendants/Respondents

On Petition for a Writ of Certiorari
To The SUPREME COURT OF CALIFORNIA

CORRECTED PETITION FOR A WRIT OF CERTIORARI

JUDGE RICE
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In Pro Se Plaintiff/Petitioner

135PS

QUESTIONS PRESENTED FOR REVIEW

ESTABLISHING DIRECT THREAT AS AN AFFIRMATIVE DEFENSE OF BUSINESS NECESSITY.
With the final findings of the California State Appellate Court in an action brought under the California Workers' Compensation Act that determined the employer's bad faith personnel actions caused the employee's industrial psyche injury and the employer stipulated that applicant had been medically cleared to return to work, the employer seeks to put forth the affirmative defense of business necessity by labeling the employee as "a threat to himself or others" to justify adverse employment actions and avoid a finding of discrimination to an industrially injured worker pursuant to the California Labor Code Section 132(a) action brought by the employee.

QUESTION: Does 29 C.F.R. sec. 1630.2(r) 56 Fed Reg. 35.726, 35.745 (1991) apply to industrially injured workers seeking benefits under the California State Workers Compensation antidiscrimination statute (Labor Code Section 132(a)), when the State courts made a determination of business necessity contrary to 29 C.F.R. sec. 1630.2(r) 56 Fed Reg. 35.726, 35.745 (1991) for determining direct threat as an affirmative defense of business necessity?

QUESTION: Does it matter that the worker was also a "handicapped individual" as defined by the Americans with Disabilities Act, 42 U.S.C. sections 12101-12213; the Rehabilitation Act, 29 U.S.C. sections 701-797 and therefore is entitled to the protection of Section 504 of the Act, 29 U.S.C. Section 794, and 42 U.S.C. 12101 et seq?

DENIAL OF DUE PROCESS AS AN ADVERSE ACTION UNDER THE LIBERALLY CONSTRUED CALIFORNIA STATE WORKERS' COMPENSATION ACT.
The California State Courts agreed with and upheld the trial court when it found the employer's bad faith personnel actions were adverse and responsible for the civil service

employee's industrial injury. The appeals court reversed the trial court's decision of discriminatory termination actionable under State Workers Compensation law. The employer had denied Petitioner, a civil service employee, his statutory right of due process contrary to Arnett v. Kennedy, 416 U.S. 134, Board of Regents v. Roth, 408 U.S. 564, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, the Fifth and Fourteenth Amendment of the U. S. Constitution due process clauses, and was an issue of a Labor Code Section 132a petition.

QUESTION: Whether the California Courts exclusion of a federally protected due process and the act of the employer to deny due process and the ultimate denial of due process was adverse, discriminatory and a breach of an employee's civil rights under the provisions of Labor Code Section 132a regardless of whether that breach causes a medical injury and contrary to Arnett v. Kennedy, 416 U.S. 134, Board of Regents v. Roth, 408 U.S. 564, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, the Fifth and Fourteenth Amendment of the U. S. Constitution due process clauses?

QUESTION: Whether the California Courts exclusion of a federally protected due process claim from the anti-discrimination statute of Workers' Compensation Law is contrary to the legislative mandate of liberal construction and violates clearly established constitutional rights of the 5th and 14th Amendments of the U. S. Constitution and conflicts with the relevant U.S. Supreme Court decisions as outlined in Crandon v. United States, 494 U.S. 152, 158 (1990); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).?

LIABILITY TIME FRAME.

The parties have a complicated litigation history which go back almost a decade. Because the Labor Code § 132a claim pleads facts occurring in 1997 and the public policy is to have such claims filed within one year, it appeared that as a matter of law, earlier examples of claimed discrimination

cannot support a finding of liability. During the trial of the Labor Code § 132 claim, defendant's objections to much of the evidence on these earlier areas of testimony were overruled. These prior disputes and the evidence related to them were allowed only for the limited purpose of showing whether or not there had been a pattern and practice of treating applicant differently from other employees.
QUESTION: Whether the California Courts including the Workers Compensation Appeals Board trial court, holding that a plaintiff may not use earlier examples of claimed discrimination to support a finding of liability under Workers Compensation law (Labor Code 132(a)) for unlawful employment practices and were allowed only for the limited purpose of showing whether or not there had been a pattern and practice of treating applicant differently from other employees that are outside the statutory charge-filing period, if the practices were "sufficiently related" to unlawful practices that occurred within the period as decided by the Ninth Circuit in Abner J. Morgan, JR. v. National Railroad Passenger Corporation, dba Amtrak; US Supreme Court No. 00-1614 Cert. Granted (U. S. Court of Appeals for the Ninth Circuit No. 99-15374 (D.C. No. CV-96-03585-SYI).?

COLLATERAL ESTOPPEL ESTABLISHMENT OF A PRIMA FACIE CASE.
The California Appeals Court agreed with and upheld the trial court when it found the employer's bad faith personnel actions were responsible for the employee's industrial injury.
QUESTION: Did the California State Courts violate principals of collateral estoppel as outlined in Gayden v Nourbakhsh, U.S. 9th Circuit Court of Appeals, No. 94-55192 (1995); Grogan v. Garner, 498 U.S. 279 (1991); Gregg v. Rahm 454 U.S. 860; and Reeves v. Sanderson Plumbing Products, Inc. (99-536); 197 F.3d 688, reversed; in the subsequent proceedings pursuant to State Workers Compensation Laws

(Labor Code Section 132(a) designed to determine the issues of a violation of civil rights, namely, establishing a prima facie case for discrimination based on an industrial injury?

ESTABLISHING A PRIMA FACIE CASE

Following a decision by the Workers Compensation Trial Court that in order to establish a prima facie case under Labor Code 132(a) applicant must show a relevant industrial injury and related adverse action taken by the employer and where on the record, it was found that applicant met his initial burden by establishing an industrial psyche claim and adverse job action, the California State courts reversed a finding of discrimination by the employer citing the employee's lack of a presenting prima facie case of discrimination. it was found applicant's stress absences were industrial, that the insubordination charge cannot be excluded from the workers' compensation process, because the use of the police chain of command to order applicant's attendance at an unsuitable examination followed by his termination was adverse and discriminatory .

QUESTION: Whether the California State courts decision regarding standards for establishing a prima facie case of discrimination in proceedings pursuant to State Workers Compensation Laws (Labor Code Section 132(a) designed to determine the issues of a violation of civil rights, namely, discrimination based on an industrial injury, conflicts with this courts standards set for establishing a prima facie case of discrimination in Reeves v. Sanderson Plumbing Products, Inc. (99-536); 197 F.3d 688, reversed; McDonnell Douglas Corp. v. Green, 411 U. S. 792, 802, St. Mary's Honor Center v. Hicks, 509 U. S. 502, 511 Wright v. West, 505 U. S. 277, 296, Furnco Constr. Corp. v. Waters, 438 U. S. 567, 577.?

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U. S. Constitution
Fifth Amendment
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Constitution of California, Article 1, Sections 1, 2, 3 and 7
Constitution of California, Article 14, Section 4.
United States Supreme Court Cases
Grogan v. Garner, 498 U.S. 279 (1991)
Reeves v. Sanderson Plumbing Products, Inc. (99-536); 197 F.3d 688, reversed;(13, 17, 23)
Crandon v. United States, 494 U.S. 152, 158 (1990)
K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)
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Goldberg v. Kelly, 397 U.S. 254 (1970)
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)
Federal Circuit Court Cases
Gayden v Nourbakhsh, U.S. 9th Circuit Court of Appeals, No. 94-55192
Abner J. Morgan, Jr. v. National Railroad Passenger Corporation, dba Amtrak U.S. 9th Circuit Court of Appeals No. 99-15374
California State Cases
Civil Service Assn. v. City and County of San Francisco , 22 Cal.3d 552
Smith v. W.C.A.B. (1984) 152 Cal. App. 3d 1104
County of Santa Barbara v. Workers' Comp. Appeals Bd. , 109 Cal.App.3d 211
Barns v. Workers' Comp. Appeals Bd. , 216 Cal.App.3d 524
Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658

Green v. Ralee Engineering Co. (1998), 19 Cal.App. 4th 66
City of Moorpark v. Superior Court (Dillon) (1998) 18 Cal.4th 1143
Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194

U.S. Code:

28 USC 1254
29 USC 202, 203
29 C.F.R. sec. 1630.2(r) 56 Fed Reg. 35.726, 35.745 (1991)
Title I of the Americans with Disabilities Act of 1990, (ADA),42 U.S.C.12111, et seq.; 42 U.S.C. 12203;
Title V, Section 503 of the Act; 29 U.S.C. Sec 794; 28 U.S.C. Sec. 1254; 28 U.S.C. Sec. 1331
Section 504 of the Rehabilitation Act of 1973

California State Codes:

Gov. Code, 19570 -19589
Gov. Code, § 12920
Gov. Code, § 12940, subd. (a)
Gov. Code, § 12993, subd. (a),
Gov. Code, § 19702, subd. (a)
Labor Code 132a
Labor Code 3202
Labor Code 4060
Labor Code Section 124.
Labor Code Section 133.
Labor Code Section 3201.
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Labor Code Section 5300
Labor Code Section 5301.
Labor Code Section 5950.
Labor Code Section 5952.
Labor Code Section 5955.
Labor Code 3820
Labor Code 5401.7.

Supreme Court Rules:

Rule 10; Rule 12; Rule 29 Rule 39

Other Authorities

Hanna Law of Employee Injuries Sec 5.103[3][d][ii](Burden of Proof)

Hanna Law of Employee Injuries Sec 35.103[3][d][iii] Establishing Direct Threat

Hanna, Cal. Law. Emp. Inj. And Workers' Comp. 2d Section 15.02 Arbitration - Public Employees' Due Process Rights

1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment, §§ 127, 139, 155, pp. 734, 743, 754-755.

Hanna, Cal. Law. Emp. Inj. And Workers' Comp. 2d Section 4.65

Hanna, Cal. Law. Emp. Inj. And Workers' Comp. 2d Section 10.11

Hanna, Cal. Law. Emp. Inj. And Workers' Comp. 2d Section 14.01

Hanna, Cal. Law. Emp. Inj. And Workers' Comp. 2d Section 17.08

City of Oakland References

City of Oakland Personnel Rule 8.02(h):

City of Oakland and Union Local 790 Memorandum of Understanding

Manual of Rules Oakland Police Department

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APPENDIX A - 02-13-02 Rice v. City of Oakland & California Workers' Compensation Appeals Board (WCAB); **Supreme Court of California; Case # S102396** (WCAB Case # OAK 0225232); Petition for Review Denied

APPENDIX B - 11-13-01 Rice v. City of Oakland & WCAB; **California Court of Appeal; First Appellate District; Case #A096159** (WCAB Case # OAK 0225232); Petition for Writ Denied.

APPENDIX C - 08-07-01 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232) **California Workers, Compensation Appeals Board; Judge Colleen Casey**; Opinion and Order Granting Reconsideration and Decision after Reconsideration.

APPENDIX D - 06-11-01 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232); Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Report and Recommendation on Petition for Reconsideration.

APPENDIX E - 05-01-01 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232); Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Finding of Fact, Award, and Orders; Opinion on Decision

APPENDIX F - 04-06-00 City of Oakland v. Rice & WCAB; California Court of Appeal; First Appellate District; #A090146; (WCAB Case # OAK 0225232); Petition for **Writ Denied**.

APPENDIX G - 01-14-00 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232); **California Workers, Compensation Appeals Board; Judge Colleen Casey**; Opinion and Order Granting Reconsideration and Decision after Reconsideration.

APPENDIX H - 12-08-99 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232); Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Report and Recommendation on Petition for Reconsideration.

APPENDIX I - 11-02-99 Rice v. City of Oakland & WCAB; (WCAB Case # OAK 0225232); Workers' Compensation Trial

Court Judge (WCJ), Richard W. Kirby, Finding of Fact, Award, and Orders; Opinion on Decision.
APPENDIX J - State of California Labor Code Section 132(a)
APPENDIX K - California Constitution Article 14 Labor Relations Sec. 4.
APPENDIX L- Applicant's February 8, 1998 Labor Code 132a Pleaded Claim
APPENDIX – M Stipulations by defendant on March 17, 1999, before the WCJ Richard W. Kirby of the Workers' Compensation Appeals Board.

CITATIONS

05-22-02 Supreme Court of the United States, Office of the Clerk, request for corrected Petition postmarked on 05-14-02 and received by the Court on 05-21-02.
02-13-02 Rice v. City of Oakland & WCAB; **Supreme Court of California**; Petition for Review Denied is set forth in Appendix A .
11-13-01 Rice v. City of Oakland & WCAB; **California Court of Appeal; First Appellate District;** Petition for Writ Denied is set forth in Appendix B.
08-07-01 Rice v. City of Oakland & WCAB; California Workers, Compensation Appeals Board; Judge Colleen Casey; Opinion and Order Granting Reconsideration and Decision after Reconsideration is set forth in Appendix C.
06-11-01 Rice v. City of Oakland & WCAB; Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Report and Recommendation on Petition for Reconsideration is set forth in Appendix D.
05-01-01 Rice v. City of Oakland & WCAB; Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Finding of Fact, Award, and Orders; Opinion on Decision is set forth in Appendix E.
04-06-00 City of Oakland v. Rice & WCAB; California Court of Appeal; First Appellate District; Petition for **Writ Denied** is set forth in Appendix F.
01-14-00 Rice v. City of Oakland & WCAB; California Workers, Compensation Appeals Board; Judge Colleen

Casey; Opinion and Order Granting Reconsideration and Decision after Reconsideration is set forth in Appendix G.
12-08-99 Rice v. City of Oakland & WCAB; Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Report and Recommendation on Petition for Reconsideration is set forth in Appendix H.
11-02-99 Rice v. City of Oakland & WCAB; Workers' Compensation Trial Court Judge (WCJ), Richard W. Kirby, Finding of Fact, Award, and Orders; Opinion on Decision is set forth in Appendix I.

STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. This petition was filed within 90 days of the denial of the petition for review by the Supreme Court of California and thus timely filed. This corrected petition was filed within 60 days of the 05-22-02 Supreme Court of the United States, Office of the Clerk, request for corrected Petition postmarked on 05-14-02 and received on 05-21-02 and thus timely filed.

CONSTITUTIONAL PROVISIONS, INVOLVED

U. S. Constitution
Fifth Amendment
Fourteenth Amendment

STATEMENT OF THE CASE

Judge Rice, pro se Plaintiff-Appellant, petitions for a writ of certiorari of the proceedings herein where the Supreme Court of California entered judgment on 2-13-02 denying a Petition for Review (**APPENDIX A**) to inquire into and determine the lawfulness of the Opinion and Order Granting Reconsideration and Decision after Reconsideration, made and filed on 08-07-01, by Defendant Workers' Compensation Appeals Board (WCAB) (**APPENDIX C**), and the Denial of a Petition for Writ of Review, made and filed on 11-13-01, by the California Court of Appeals, First Appellate District, Division Four,

(**APPENDIX B**) in the proceeding before the WCAB under California Labor Code 132a, (**APPENDIX J**) entitled "Judge Rice, Petitioner vs. City of Oakland, Defendants," Case Number OAK 0225232.

At all times mentioned herein, Defendant, Employer, City of Oakland is a public entity located in the County of Alameda, State of California; organized and existing under the laws of California in Oakland, California.

At **all times** mentioned herein, Petitioner, JUDGE RICE, was **unrepresented** by an attorney.

Petitioner, a permanent civil service employee, worked for the City of Oakland, Police Department, as a Correctional Officer from June 11, 1989 to June 26, 1997 at which time he was sent home from work. Using the police chain of command and citing its Personnel Rule 8.02(h) the employer ordered Petitioner to an appointment with the City Physician, Dr. Fred Blackwell, which he attended on June 25, 1997. Dr. Blackwell was going to refer Petitioner to Dr. Randall Smith for a psychiatric examination at the City's request. Petitioner returned to work, awaiting a proper written referral with an appointment date and time and transportation expense, as this was the City's past practice regarding medical appointments.

Notwithstanding the fact that he was not absent from work, Petitioner, Judge Rice, was sent home with a fictitious punitive action called unauthorized leave **without pay**, and a charge of insubordination by his supervisor, Lawrence Green and the Defendant, City of Oakland, relieved Petitioner from his duties.

Prior to the appointment scheduled on June 25, 1997, Petitioner was working full-time without restrictions, having been cleared by both the City's physician and his treating physician. On June 9, 1997 following an industrial injury of stress, (WCAB Case No. 0225232), Petitioner had returned to work full-time without restrictions, having been cleared by the City's physician, Dr. Petropoulous, and his own treating physician, Linda Kuwatani, M.F.C.C. Three days later, he

suffered an industrial injury to his left knee, and Petitioner again had returned to work full-time without restrictions on June 18, 1997, having been cleared by the City's physician Dr. Wesley Watkins and his own treating physician, Dr. Gloria Vreeland. (See Personnel Rule 8.02(h))[1]

The City took Petitioner off work pending a second medical examination by Dr. Randall Smith, who, due to Petitioner's workers compensation claim, had first examined Petitioner as the City's Qualified Medical Examiner (QME) for the Stress Claim filed on 2-15-95 which, based on Dr. Randall Smith's report, led the employer to deny the claim. (OAK 225232 (Amended Cumulative Injury through June 26, 1997 to the psyche).

In September 1995 Petitioner filed an application to adjudicate this claim with the Workers Compensation Appeals Board, (WCAB). Presiding Workers Compensation Judge (PWCJ) George Mason was assigned prior to the trial and later Workers Compensation Judge (WCJ) Richard W. Kirby was assigned as Trial Judge.

Also in 1995, Petitioner became aware of an AOE/COE summary after it was given to Dr. Randall Smith by the City prior to his examination, which contained numerous dishonest, false and fraudulent statements.

For the next three (3) years (1995-1998), using the provisions of the Workers Compensation Act, (**APPENDIX K**) Petitioner demanded the complete report from the City,

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[1] City of Oakland Personnel Rule 8.02(h):
"Verification of Illness-Abuse of Sick Leave. A department head may require of any employee under his jurisdiction, who has been on sick leave for one or more working days, a doctor's certificate or other authoritative verification , certifying that the illness was bona fide. He also may require that the employee be examined by the City Physician for the purpose of determining whether he is, in fact, well enough to return to his regular duties. The employee concerned shall be considered on sick leave status until the City Physician releases him for duty."

invoking his right of due process and was denied his right to cross-examine the interviewees of that AOE/COE summary.

Also during this time (1995-1997), Petitioner had been demanding his statutory right to a panel Qualified Medical Examiner (QME) and the employer, City of Oakland denied Petitioner his statutory right to a panel QME from the City for his disputed claim (OAK 0225232).

Defendant breached its duty to grant Petitioner's request for a QME, (Petitioner, as an unrepresented worker with a disputed medical claim invoked the rights of CA Labor Code 4060 which is a right to a QME), which was obtained by a court order of the (PWCJ) George Mason on October 10, 1997. Within seven (7) days the City decided to hastily and hurriedly terminate Petitioner with a notice to terminate from Police Chief Joseph Samuels on October 17, 1997 and seven (7) days later he was terminated from his position on October 24, 1997.

In the meantime, on 4-2-97, Petitioner voluntarily testified and provided the Alameda County Grand Jury (Law & Justice Committee) with evidence of the misappropriation of funds budgeted for the hiring of Correctional Officers, which was used to pay sworn Oakland Police Department personnel overtime to "work" in the jail, one of which was the brother of Jail Commander, Lt. Lawrence Green. Petitioner provided the Alameda County Grand Jury with the letter of 4-19-96 from City Human Resource Director Jim McCormick to Petitioner's Union, SEIU Local 790, in which he recommended the demotion of physically handicapped Correctional Officers such as Petitioner, to allegedly save the City $74,000.

On or about 6-26-97 the Alameda County Grand Jury, Law and Justice Committee Report was released[2]

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[2] "Further inquiry into this matter revealed that on average, 17 personnel work overtime in a 24 hour period - 6 of whom are sworn officers. In a 90 day period, there were several days when, as many as 10 sworn officers worked overtime in a 24 hour period. The officers are not only paid at a much higher rate than correctional officers, but they are paid at the

On or about 6-30-98 is the **Alameda County Grand Jury Final Report; Law and Justice Committee Report** was released.[3]

Petitioner filed 3 grievances with his Union, SEIU Local 790 on 6-28-97 (Unauthorized leave, no pay; Harassment; Working Alone). On 11-4-97, 134 Days after Petitioner's grievances were filed, SEIU Local 790 official, Margaret Cunningham admits that contrary to California law and in violation of the City-Union contract, there was no notice of Petitioner's termination, and on 10-31-97 she filed a grievance regarding the termination.

On 2-24-98 the Union and City had a Step 3 meeting on the grievances 265 days after 6-28-97 and 130 days after 10-31-97 (TERMINATION). On 3-20-98 Margaret Cunningham informed Petitioner of the Step 3 grievance denial, 285 days after 6-28-97 and 155 days after termination and the Union was undecided on moving them to arbitration. Notwithstanding, Petitioner had requested arbitration the first week of July, 1997. Union Local 790 Memorandum of Understanding effective from July 1, 1995 until June 30, 1999 states: "The City will provide a copy of the "Skelly" notice of intent letter to the designated representative, if any, of the involved employee."

Furthermore, on June 25, 1997 in the workers' compensation appeals process, Petitioner was still trying resolve the issue of the AOE/COE summary, **invoking his right of due process to cross-examine the adverse**

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overtime rate of time-and-one-half. Based on these figures, in a 3 month period the amount paid to sworn officers working overtime in the jail division would be approximately enough to pay for three (3) full time correctional officer positions for one full year."

[3] (1)problems associated with excessive money paid to police officers working in the jail caused by shortages of correctional officers; (2)general disorganization in the management style of the jail's commanding officer (Lt. Lawrence Green) **$3.4 million dollar overtime costs** in the first 8 months of fiscal year 97-98.

interviewees. Petitioner's right to due process has been obliterated in that the City tried to have the report removed from evidence once Petitioner demanded to know who made the statements.

Petitioner, had filed five relevant workers' compensation claims against his employer, the City of Oakland: the February 15, 1995 OAK 0225232 (Amended Cumulative Injury through June 26, 1997 to the psyche) which included this Labor Code 132a claim for benefits; WCK 41016 (February 27, 1997, Gastrointestinal); WCK 39110 (June 12, 1997, left knee); WCK 41017 (November 13, 1991, Human Bite).

Thereafter, there were proceedings before Defendant, Workers' Compensation Appeals Board. Four days of trial were held and evidence was received on March 17, 1999, May 12, 1999, June 24, 1999, and July 21, 1999. (**APPENDIX H; I**)

After Appellate review (**APPENDIX F**, Case # A090146; (WCAB Case # OAK 0225232); the claims were disposed in Petitioner's favor, (with the exception of Petitioner's Claim for benefits pursuant to Labor Code Section 132(a) which inadvertently was not addressed), with the Findings and Award and Orders of the **WCAB Judge Colleen S. Casey on 1-14-00.** (**APPENDIX G**)The City sought reconsideration and WCAB **Judge Colleen S Casey denied reconsideration. The City was then denied a Petition for Writ of Review by the California Appeals Court by Judges P. J. Hanlon, J. Reardon and J. Sepulveda on 4-6-00.** (**APPENDIX F**) Defendant City did not pursue a Petition for Review with the Supreme Court of California.

In Case No. OAK 0225232, WCAB Trial Court Judge (WCJ) Richard W. Kirby held: (**APPENDIX H; I**)

> 1. Petitioner, born January 18, 1956, while employed as a jailer/ correctional officer by the City of Oakland, lawfully uninsured for workers' compensation benefits between 1989 and June 26,

1997, sustained injury arising out of and occurring in the course of his employment to his psyche.
1. Petitioner incurred reasonable self-procured medical costs. 3. Petitioner did not sustain any temporary disability as the result of this claim. 4. Petitioner is in need of further medical treatment. 5. Petitioner did not sustain permanent disability.

Award

Award is made in favor of Judge Rice against the City of Oakland of: (a) The reasonable costs of self-procured medical care. (b) Petitioner is in need of further medical care to cure of relieve him from the effects of the injury herein.

Order

The date of the injury in OAK 225232 is amended to conform to proof by showing the date 1989 through June 26, 1997.

"In the period before April 2, 1997, Petitioner let it be known that he intended and did testify before the county grand jury on the problems of understaffing at the jail. The understaffing required more expensive police officers to fill in at higher police officer's wages to compensate for the understaffing. Generally, police officers were able to get overtime pay for the additional hours they put in covering at the jail because there were inadequate number of correctional officers. Petitioner was particularly concerned that police officers who supervised the jail were in a position to enhance the salaries and economic benefits of friends and associates in the department through this overtime pay. He was also concerned that correctional officers were threatened with layoffs or further job reclassifications to lower pay and salary. His position, which was a light-duty position might be eliminated entirely."

"This public disapproval of a departmental policy was stressful to him. Police officers working in the jail at overtime can hardly be expected to welcome his characterization of them in a highly unfavorable light."

At this point, it is important to assess Petitioner's credibility with regard to the issues of his emotional distress. I believe that psychological profiles prepared by Nathan J. Zilberg, Ph.D. for Dr. Petrakis and that of Dr. Mark Kimmel, Ph.D. for Dr. Goldmacher are important and they confirm my impression that Petitioner is truthful and wants to be vindicated with reference to his claims against the City."

However, by the end of his employment, Dr. Goldmacher's analysis that Petitioner's depression was related to his work seems correct. Dr. Patrakis allowed that if the Petitioner's perceptions are correct, then he did suffer an industrial injury.

"On further analysis, there is a pattern of management judgments which collectively seem less than appropriate.

Petitioner has shown that his exposure to the possible HIV virus was not handled properly and that the inmate was allowed to leave the country before being tested. No report to the District Attorney was made and the federal inmate left the country before Petitioner's supervisors thought of having him tested. Without assigning blame, this stressor does not follow within the normal good faith personnel defense.

WCJ Richard W. Kirby's Report and Recommendation on Petition for Reconsideration stated: **(APPENDIX H; I)**

"The board has broad powers in providing for the medical needs of an injured workman. The bite was an injury. The possible infection is real. The aggressor inmate should have been checked for HIV

infection before he left the City jail. The City should not be allowed to shirk its obligations where it made no effort to protect Petitioner by getting the aggressor tested."

"Petitioner appears to have done a good job as a correctional officer according to his job reviews. He was concerned about his knee disability and reductions in staff both of which he tried to address. He requested ADA accommodation for his knee disability and went to the grand jury with information about job staffing."

"The record is clear that Petitioner was stressed from both personnel actions and non-personnel actions during a period when he was getting good job evaluations."

The 1-14-00 Opinion and Order Granting Reconsideration and Decision After Reconsideration by WCAB Judge Colleen S. Casey 01-14-00 stated: **(APPENDIX G)**

"Based on our review of the record, and for the reasons stated by the WCJ in his report and recommendation of December 8, 1999, which we adopt and incorporate by reference herein, "In all other respects, we adopt and affirm the WCJ's decision, for the reasons stated in his report and recommendation." "It is further ordered that this case be, and the same hereby are ordered returned to the trial level for any other further proceedings and decision."

Thereafter, pursuant to the WCAB Opinion and Order Granting Reconsideration and Decision After Reconsideration, by WCAB Judge Colleen S. Casey, dated January 14, 2000, there were proceedings before Defendant Appeals Board to deal with Petitioner's claim for benefits under California Labor Code Section 132(a) claim in OAK 0225232 which is associated with his cumulative (psyche) stress injury. Applicant's February 8, 1998 Labor Code

132a Pleaded Claim is set forth in **APPENDIX L** and included:

> "Applicant is informed and believes, and thereon alleges, that defendant's termination of applicant was nothing other than an attempt to discriminate against applicant for filing an application, and the adjudication for his workers' compensation benefits. WHEREFORE, applicant respectfully requests that he be awarded the benefits provided by California Labor Code Section 132(a) including increased compensation, reinstatement and reimbursement for lost wages and work benefits caused by said defendant's act."

"The Labor Code Section 132(a) claim must be measured against the facts pleaded and the evidence presented. After making finding of fact, the applicable law must then be applied." (05-01-01, (WCJ), Richard W. Kirby, Finding of Fact, Award, Orders and Decision.)(**APPENDIX E**)

Five days of **supplemental trial** was held in which additional evidence was received on August 29, 2000, August 30, 2000, August 31, 2000, January 24, 2001, and January 25, 2001 and **the record was further developed fully encompassing the record and decisions of the first trial. (APPENDIX D; E)**

On May 1, 2001, the Trial Court (WCJ), Richard W. Kirby, Finding of Fact, Award, Orders and Decision **(APPENDIX E)**was issued in Petitioner's favor with a finding that Defendant City of Oakland unlawfully discriminated against Petitioner in violation of Labor Code section 132a.

The May 1, 2001 Finding Of Fact, Award And Order stated: **(APPENDIX E)**

> "The above-entitled matter having been heard and regularly submitted, Richard W. Kirby, Workers' Compensation Judge, now makes his decision as

follows:

FINDING OF FACT 1. Defendant City of Oakland unlawfully discriminated against Petitioner in violation of Labor Code section 132a.

AWARD AWARD IS MADE in favor of Petitioner against the CITY OF OAKLAND of (a) An increase in employee compensation herein by one half and in no event more than ten thousand dollars, together with cost and expenses not to exceed $250.00. (b) Entitlement to lost wages for the period June 27, 1997 to date, less credit for EDD payments and retirement benefits.

ORDER IT IS ORDERED that Petitioner be reinstated to his position as jailer by the City of Oakland.

On June 11, 2001, following Defendant's Petition for Reconsideration to the WCAB, the Trial Court Judge, Richard W. Kirby, **(APPENDIX D)** recommended that defendant's petition for reconsideration be denied.

WCJ Kirby Report and Recommendation on Petition for Reconsideration; 6-11-01: **(APPENDIX D)**

Prima Facie Standards for Labor Code 132a Claim

As the decision notes, the basic standards for finding of discrimination under Labor Code 132a are becoming clear. The statute is liberally construed and does not require a finding of malicious or discriminatory intent. Rather, the prima facie case is set forth by showing a relevant industrial injury and related adverse action taken by the employer.

Relevant industrial injury

Petitioner has met his initial burden by establishing an industrial psyche claim. It was found based on the opinions of Dr. Lawrence Petrakis, M.D. and Dr. Donald Goldmacher, M.D. that Petitioner sustained an injury to the psyche. Petitioner was allowed further medical care based on Dr. Goldmacher's opinion.

Related adverse action taken by the employer
The related adverse action was placing Petitioner on unauthorized leave without pay or temporary total disability and termination for insubordination because he failed or refused to keep an appointment for a psychological examination with Dr. Randall Smith,- Ph.D. during the summer of 1997. Dr. Smith previously examined Petitioner as the City's third party administrator's request for a February 15, 1995 stress claim.
In this case, there were at least **three parallel legal systems** at work at the same time.
The **first** for purposes is the **workers' compensation system**, which is normally initiated by the formal notice claim. Here, it started with a DWC-1 dated February 15, 1995 alleging a stress claim. It was followed by a duty to investigate the claim no later than the 90th day. Since Petitioner was unrepresented, as part of the medical investigation, he should have been sent to a QME for an industrial evaluation (AOE-COE). Here, in addition to his other workers' compensation claims, this application for claim alleged a February 15, 1995 psyche injury resulting from "intentional infliction of emotional distress" with an attached DWC-1 dated February 15, 1995, indicating that the injury was ongoing. In the November 1999 Findings and Award, the injury was amended by the Board to include Petitioner's entire employment from 1989 to June 27, 1997.
The **second** parallel system is mandated by the **Oakland City Charter and the City's personnel manual** which provides for the fitness for duty examination referred to above, and specifically the section 8.02(h) examination process.
The **third** parallel system is that provided by the **labor-management agreement** between the City and its employees.

Does Workers' Compensation Preempt The City Personnel Action

The first determination which must be made is whether the state industrial injury process which was authorized by the California State Constitution preempts the parallel system mandated by Oakland City Charter, its personnel rules or its labor-management agreements.

In view of the size of Petitioner's files (two storage boxes) and because the file has been before the Board twice already, the issues raised by defendant's petition will be discussed in the same order.

Dr. Smith's Examinations

Normally, the parallel legal systems do not cross and each system provides for due process with suitable appeal and review. In this case, the City's third party administrator first chose to use Dr. Randall Smith, Ph.D. as a defense medical examiner for Petitioner's workers' compensation case. (See March 30, 1995 examination and its December 12, 1995 request that Petitioner see Dr. Sandra Smith, Ph.D. as their examiners for his February 15, 1995 claim). Dr. Randall Smith and Dr. Sandra Smith clearly became industrial examiners for some purposes, and in this process generated Dr. Randall Smith's April 15, 1995 report.

The question must then be addressed as to whether a subsequent referral by the City physician for an examination by Dr. Randall Smith in the context of a fitness for duty situation brings the two separate parallel legal systems together.

My reading of this file shows that Dr. Smith was an AOE/COE examiner for the 1995 industrial claim. This is further complicated because of Dr. Smith's April 30, 1995 report was excluded from the evidence **because the City refused to provide Petitioner with**

materials shown to Dr. Smith which influenced Dr. Smith's 1995 adverse opinion.

Petitioner's reluctance to return to Dr. Smith seems obvious. While PWCJ Mason dealt with Petitioner's denied psyche claim among others, in 1996 defendant sought a new psyche examiner, Dr. Lawrence Petrakis. Petitioner ultimately kept this examination as is noted above by Dr. Petrakis and Dr. Donald Goldmacher's opinion supporting a finding of industrial injury to the psyche.

The City physician's referral of Petitioner's to Dr. Smith in June 1997 under the City's personnel rules **ignores the history of a prior dispute** over Dr. Smith's April 30, 1995 report, which was pending before the Board during 1996 and 1997 and undoubtedly created much of the controversy which was discussed with PWCJ Mason before the case was assigned to me for trial. My decision after trial on the regular issues was that while Petitioner may not have wanted to go to Dr. Smith again, the City had a parallel system which authorized the examination based on the City's need to provide a safe jail.

However, **in the trial of the Labor Code 132a claim, a different and stricter standard is used. It is not whether such an examination with Dr. Smith was lawful but whether its use was adverse and discriminatory in fact, regardless of the City's intent.** If it was, then Petitioner prevails. If it was not, then the City prevails.

In the context of the period of June 1997, there does not appear to be a non-work reason for Petitioner's stress. Certainly, he had previous non-stress and even a preexisting emotional disability, but these causes were not established as being the cause of his June 1997 stress absences. On this record, I find that his stress absence in June 1997 were industrial and that Dr. Smith's examination cannot be excluded

from the workers' compensation process. Under California workers' compensation, there is no acceptable procedure for taking Petitioner off work, without the availability of sick leave, and without temporary total disability under such circumstances. Further, to require Petitioner to attend a further examination with Dr. Smith, where his opinion has been tainted by previously sending him documentation which would not be acceptable under the workers' compensation system, appears unfair. The use of the police chain of command to order attendance at an unsuitable examination is adverse and discriminatory. The Petitioner has established his claim on the record.

I remain of the opinion that it was discriminatory to require Petitioner to go back to Dr. Smith a second time when his opinion was already tainted and his previous report excluded because the City would not share with Petitioner the investigative material which it forwarded to Dr. Smith at the time of his earlier April 1995 exam.

Petitioner was awarded increase of benefits by one half and in no event more than ten thousand dollars ($10,000.00) together with costs not to exceed $250.00. He was also awarded lost wages from June 27, 1997 to date less credit for EDD payments and retirement benefits.

While it is true Petitioner testified he looked for work, it is also true that the city denied his state disability benefits, and took the retirement benefits only after the City refused to take him back without Dr. Smith's release to work. The City had released to work opinions from Dr. Kuwatani, his treater, Dr. Petrakis and Dr. Goldmacher. **No offer of reinstatement was ever offered**. The back wages are due Petitioner under Labor Code 132a.

Recommendation
It is respectfully recommended that defendant's petition for reconsideration be denied.

On August 7, 2001 the WCAB **Judge Colleen S. Casey** Opinion and Decision After Reconsideration **(APPENDIX C)** issued with a finding that Defendant City of Oakland did not discriminate against Petitioner in violation of Labor Code section 132a. "we will rescind the WCJ's decision, and substitute therefore a decision after reconsideration finding that the employer did not violate Labor Code section 132a insofar as the workers' compensation case played no part in the termination."

Thereafter, Petitioner sought a Petition for Writ of Review with the California Court of Appeals and on November 13, 2001 an order issued denying Petitioner's request. **(APPENDIX C)**

Thereafter, Petitioner sought a Petition for Review with the Supreme Court of California and on February 13, 2002 an order issued denying Petitioner's request. **(APPENDIX C)**

REASONS FOR GRANTING REVIEW

- Due to the stigmatizing and lingering ill effects of an employer making a false claim against an industrially injured worker, the courts need to have specific and uniform standards to adjudicate claims of a business necessity concern for the safety and well being of employees and co-employees. **(APPENDIX M)**
- WCAB has not followed the spirit or the intent of the law, as it has been written and ratified by the California State Legislature. **(APPENDIX J; K)**
- The Appeals Court decision determined that the City of Oakland engaged in bad faith personnel actions. See Court of Appeals, First Appellate District, Case Number A090146; WCAB Case No. OAK 0225232. **(APPENDIX F)**; Smith v.

W.C.A.B. (1984) 152 Cal. App. 3d 1104[4] ; Judson Steel Corp. v. Workers' Comp. Appeals Bd., 22 Cal.3d[5]; Bowen v. Workers' Comp. Appeals Bd. (1999) , 73 Cal.App.4th 15[6]; Arriaga v.

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[4] We do not mean to read into section 132a an element of malice or bad faith. Employer concedes, and County of Santa Barbara, supra, makes it clear, that acts which are motivated entirely by neutral criteria unrelated to the claimant or the class of industrially injured employees may nevertheless violate section 132a. Of course, evidence tending to prove malice or bad faith will necessarily undercut a tendered defense of "business realities." Any evidence tending to prove that the rule was not properly applied worked to weaken the affirmative defense, because it tended to prove also that the action was not necessary and that it was not directly linked to business realities. Any evidence tending to prove that the rule was not properly applied worked to weaken the affirmative defense, because it tended to prove also that the action was not necessary and that it was not directly linked to business realities. Plainly, the Board failed to consider the essential corollary questions of whether that causal connection was supplied by the actions of management people other than the one who fired Smith, or by employer's failure, in the days or weeks after the termination, to rescind the action or at least to tender reinstatement, in light of the course of events which preceded it.
That is, the scope of section 132a as it is explained in Judson Steel cannot be limited artificially to include only the motives and actions of the individual person who was employer's ultimate agent in the commission of the allegedly discriminatory action, and only at the time he acted.
[4] Corporate employers are charged with knowledge of and responsibility for all of the relevant acts of all their agents done within the scope of employment. (See Civ. Code, §§ 2295, 2332, 2338, 2339; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment, §§ 127, 139, 155, pp. 734, 743, 754-755.)

[5] section 3202 of the Labor Code enjoins us to construe the workers' compensation laws "liberally ... with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (See Flores v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 171, 176 [113 Cal.Rptr. 217, 520 P.2d 1033].) We have held heretofore that the rule of liberal construction applies to all aspects of the workers' compensation law, including "penal" provisions. (Kerley v. Workmen's Comp. App. Bd. (1971) 4 Cal.3d 223, 227 [93 Cal.Rptr. 192, 481 P.2d 200]; see also Davison v. Industrial Acc. Com. (1966) 241 Cal.App.2d 15, 17-18 [50 Cal.Rptr. 76].)

County of Alameda (1995) 9 Cal.4th 1055, 1065 [40 Cal.Rptr.2d 116, 892 P.2d 150][7]; Reeves v. Sanderson Plumbing Products, Inc. (99-536); 197 F.3d 688, reversed[8];

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[6] it is a workers' compensation case which evokes the public policy of the State of California reflected in section 3202 directing the courts to construe liberally sections 3600.5 and 5305. This is consistent with the statutory mandate that state workers' compensation laws are to be 'liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' (Lab. Code, § 3202.)"

[7] the Supreme Court stated that its conclusion in the case "... comports with the Legislature's command in section 3202 that the Act 'be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment.' This command governs all aspects of Workers' compensation; **it applies to factual as well as statutory construction.** [Citations.] **Thus, 'if a provision in [the Act] may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construct is possible.'** In 1972, however, the Legislature amended section 132a not only to provide for criminal sanctions and the payment of a penalty under Labor Code section 4553, but, more importantly, to declare broadly the policy of California "that there should not be discrimination against workers who are injured in the course and scope of their employment." (Stats. 1972, ch. 874, § 1, p. 1545.) Although section 132a specifically provides sanctions against "[a]ny employer who discharges, or threatens to discharge" an employee, as the board in the instant case noted, the provisions of the statute are not limited to those actions. Section 132a further prohibits employers "in any manner [to] discriminat[e]" against industrially injured employees; the section thus refers to other ways in which an employer may unlawfully penalize an employee. In Judson Steel, supra, a showing of unlawful discrimination was made upon evidence that the employer had done no more than to "eschew [] its [152 Cal.App.3d 1109] own standard procedure for safeguarding absent employees' accumulated seniority."(22 Cal.3d at p. 665.) It was conceded that employer had a technical contract right to "eschew" the standard procedure. **The court held that, nevertheless, the exercise of that right constituted unlawful discrimination.**

[8] decided the question if an employee who discredits an employer's stated reason must also offer proof of an illegal motive. This Court said proof of an illegal motive is not always required. Plaintiff's disability played a role

County of Santa Barbara v. Workers' Comp. Appeals Bd., 109 Cal.App.3d 211[9]; Leamon v. WCAB [190 Cal.App.3d 1409][10]; Barns v. Workers' Comp. Appeals Bd., 216 Cal.App.3d 524[11]

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in Defendants decision making process and had a determinative influence on the outcome.

[9] We freely admit that here, as in Judson Steel, there is no evidence that the employer violated any of the specific prohibitions of section 132a. In other words, nothing suggests that the County penalized Bouslaugh for availing himself of the remedies of the workers' compensation law. Yet here, as in Judson Steel, the action taken against the employee fits comfortably into the preamble on the basis of which Judson Steel was decided: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."

[10] Thus, the unlawful discrimination consisted of adverse employment action predicated upon an absence from work known to the employer to be caused by an industrial injury." To similarly conclude here, it must be found that Leamon's dismissal was predicated, in material part, upon absences which Campbell knew to be caused bt industrial injury. "Campbell, before its discharge action, knew that Leamon claimed that this absence was caused by an industrial injury. Campbell rejected the claim because it disputed its validity."

[11] In Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra, 22 Cal.3d at page 667, the court held that section 132a affords relief to any employee who suffers discrimination as a result of an industrial injury, even if the discriminatory conduct is not of the type specifically identified in the statute. The court added, however, that the statute "does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." This court elaborated on the principles of Judson Steel in Smith v. Workers' Comp. Appeals Bd., supra, 152 Cal.App.3d 1104, 1109. We held there that the Board had erroneously applied section 132a in upholding the discharge of an employee for a supposed violation of company policy. We held that a worker proves a violation of section 132a by showing that as the result of an industrial injury, the employer engaged in conduct detrimental to the worker. If the worker makes this showing, the burden shifts to the employer to show that its conduct was necessitated by the realities of doing business. (Ibid.) We emphasized that the employer must demonstrate that its action was "necessary" and

- The City did not present any substantial evidence to meet their burden of proof that applicant was a direct threat. See Hanna Law of Employee Injuries Sec 35.103[3][d][ii](Burden of Proof), [iii] Establishing Direct Threat,29 C.F.R. sec. 1630.2(r) 56 Fed Reg. 35.726, 35.745 (1991);[12]; NEC Electronics, Inc., v. W.C.A.B. (August 1993) 58 CCCases 464 writ denied (citing County of Santa Barbara v. W.C.A.B. 1980, 109 Cal. App. 3d 211[13];

"directly linked to business realities." **An employer cannot simply pounce upon a preliminary opinion as evidence of business necessity and, without further investigation, sever the employment relationship. Where no more than this is shown, a finding of business necessity lacks substantial evidentiary support and rests on a misconstruction of the applicable law.(p 536)**

[12] The house Report on the ADA sets a high burden of proof in determining whether an employee poses a "direct threat" to the health or safety of others and states that a "speculative" or remote risk" is not sufficient. The standard is not whether the employee poses no risk, or merely a slightly increased risk. Before an employer may take an adverse employment action, there must be actual proof of "significant risk" of substantial harm to the individual or others that cannot be eliminated or reduced by reasonable accommodation, and the employer must have actual, objective proof of significant risk. (56 Fed. Reg. 35.726, 35.730 (1991). With this high threshold for showing direct threat, it would seem that the employers' efforts to bar an injured worker from returning to work should rarely succeed. The EEOC's regulation on direct threat requires that employers no base decisions on "subjective perceptions, irrational fears, patronizing attitudes or stereotypes" about the nature of an individual's disability.

[13] ...citing County of Santa Barbara that although the termination policy treated all disabilities, industrial and non industrial alike, it nonetheless acted to the detriment of injured workers and constituted discrimination against them. **It is not necessary; the WCJ noted to show that the employer intentionally discriminated against these employees but that the employer's action caused detriment to industrially injured workers..**

- The City should not be allowed to go unpunished for attempting to stigmatize applicant without any substantial evidence.
- The WCAB should not be allowed to overturn the trial court's decision when WCJ Richard Kirby found that applicant was credible, competent and justified in pursuing his rights as a citizen of this state and country. (See City of Moorpark v. Superior Court (Dillon) (1998) 18 Cal.4th 1143 [77 Cal.Rptr.2d 445; 959 P.2d 752]

  > "Section 132a, however, addresses a breach of an employee's civil rights and applies regardless of whether that breach causes a medical injury. (1154)"

- Defendant produced no evidence that could support a charge of poor work performance by Applicant and there has been no finding of fact that Applicant had poor work performance. Petitioner's evidence proved that petitioner's job performance was above standard. Petitioner established on the record that he was ready, willing and able to perform his duties. Smith v. W.C.A.B. (1984) 152 Cal. App. 3d 1104[14]; Barns v. W.C.A.B.)(1989)[15]; (Burbank Studios v. W.C.A.B.) (1991)

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[14] "section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available," (Judson, at p. 667) it is possible to conclude that **save for the two exceptions** just described, **action which works to the detriment of the employee because of an injury is unlawful under section 132a.** Plainly, the Board failed to consider the essential corollary questions of whether that causal connection was supplied .....by employer's failure, in the days or weeks after the termination, to rescind the action or at least to tender reinstatement, in light of the course of events which preceded it.

[15] For example, the Appeals Board has found that an employer violated Section 132a by discriminating against an employee who had suffered an industrial injury **when the employer failed to offer to reinstate the employee in his prior job after he was released to return to work by his treating physician.** (Burbank Studios v. W.C.A.B.)(1991)

- Applicant's case no. OAK 225232 originated from his workers' compensation claim of an injury that occurred on November 13, 1991 and amended by the court as a cumulative injury.
- During the underlying trial (WCAB Case Number OAK 225232) and the City of Oakland's defense of the now final findings of bad faith personnel actions there had been no allegations, no evidence presented, and no findings to support the fabricated statements in the employer's May 18, 2001 Petition for Reconsideration to the WCAB of "ranting and raving", "out of control", "potential for work place violence".
- Therefore, the WCAB labeling and depiction of applicant in their August 7, 2001 decision with the terms "acting out" and "outbursts at work" are equally without merit. The employer's and WCAB's characterization of Petitioner as described above is totally fabricated, without foundation, and unsupported by the record.
- Petitioner's credibility is confirmed by the 11-2-99 findings of the trial judge, WCJ Richard Kirby.[16]
- Petitioner established on the record that he was ready, willing and able to perform his duties.
- The evidence established that the 6-12-97 order for Petitioner to attend the 6-25-97 Fitness for Duty appointment with Dr. Fred Blackwell, pursuant to Personnel Rule 8.02(h) adversely affected Petitioner. Green

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[16] "At this point, it is important to assess Petitioner's credibility with regard to the issues of his emotional distress. I believe that psychological profiles prepared by Nathan J. Zilberg, Ph.D. for Dr. Petrakis and that of Dr. Mark Kimmel, Ph.D. for Dr. Goldmacher are important and they confirm my impression that Petitioner is truthful and wants to be vindicated with reference to his claims against the City. Petitioner appears to have done a good job as a correctional officer according to his job reviews. He was concerned about his knee disability and reductions in staff both of which he tried to address. He requested ADA accommodation for his knee disability and went to the grand jury with information about job staffing."

v. Ralee Engineering Co. (1998), 19 Cal.4th 66; Foley, supra, 47 Cal.3d at pp. 670-671, fn. 12.; Gantt, supra, 1 [19 Cal.4th 88] Cal.4th at p. 1095.)[17]

- Petitioner's testimony and supporting documentary evidence proved that the Defendant's reliance on Personnel Rule 8.02(h) in the 6-12-97 written order was misapplied and inappropriate.
- The employer's action of placing Petitioner on unauthorized leave without pay is a punitive action subject to administrative hearing. Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 202 [124 Cal.Rptr. 14, 539 P.2d 774]; Civil Service Assn. v. City and County of San Francisco , 22 Cal.3d 552; Arnett v. Kennedy (1973) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633][18];

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[17] A regulation purporting to obligate the employee to comply with an order of the employer directing the employee to violate the jurisdiction of the WCAB would clearly have been void as against Workers Compensation and a 132a violation. Further discharging an employee on this basis, violates a fundamental duty imposed on all employers for the protection of the public interest." (Foley, supra, 47 Cal.3d at pp. 670-671, fn. 12.) Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies. Moreover, by allowing employees to rely on regulations that are supported by the important policies.... we satisfy our goal to balance the competing interests by (1) providing the employer with proper warning it is violating fundamental public policies, (2) ensuring employees are protected against employer actions that contravene fundamental policy, and (3) guaranteeing to the public that employers' interests will not be protected at the expense of society's most important policies. As plaintiff notes, Gantt holds employers responsible for knowing "the fundamental public policies of the state and nation." (Gantt, supra, 1 [19 Cal.4th 88] Cal.4th at p. 1095.)

[18] Civil Service Assn. v. City and County of San Francisco , 22 Cal.3d 552 Appellants base their claim to prediscipline rights upon Skelly v. State Personnel Bd., supra, 15 Cal.3d 194. In Skelly we held that before the employee therein involved could be terminated from his permanent civil service position with the State of California he was entitled to preremoval safeguards. After analyzing the opinion of the various justices in Arnett v. Kennedy (1973) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], we concluded:

- Defendant breached its duty to grant Petitioner's request for a QME, the statutory right of an unrepresented worker. Defendant was ORDERED by PWCJ George Mason on October 10, 1997 to grant Petitioner's right to a QME for his Stress Claims which was prior to Petitioner's termination of October 24, 1997.
- Petitioner, as an unrepresented worker with a disputed medical claim invoked the rights of Labor Code 4060 which is a right to a QME. Petitioner established his QME demands under Labor Code 4060. Defendant disputed the claims of 2-15-95; 10-6-95; 2-28-97 and 6-5-97.

"It is clear that due process does not require the state to [22 Cal.3d 559] provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (15 Cal.3d at p. 215.) Both Skelly and Arnett involved discharges from employment of the employees therein involved. Skelly states at 15 Cal.3d 207-208: "... when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (Goldberg v. Kelly (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296; 90 S.Ct. 1011]; see Geneva Towers Tenants Org. v. Federated Mortgage Inv. (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Suspension of a right or of a temporary right of enjoyment may amount to a "taking" for "due process purposes" (Goss v. Lopez (1975) 419 U.S. 565, 572-76 [42 L.Ed.2d 725, 733-736, 95 S.Ct. 729]; Connolly Development, Inc. v. Superior Court (1976) 17 Cal.3d 803, 811 [132 Cal.Rptr. 477, 553 P.2d 637]). **The promptness of the postdisciplinary hearing would be very important in a termination** or long-term suspension. Obviously, the uncertain quality of an employee's status and other harm accruing to him is greater the longer the issues remain unresolved by hearing "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." (Id., at p. 574 [42 L.Ed.2d at p. 735], quoting Wisconsin v. Constantineau (1971) 400 U.S. 433, 437 [27 L.Ed.2d 515, 519, 91 S.Ct. 507].)

- The WCAB violated the statutory obligation of liberal construction in the application of the law regarding 132a proceedings by rescinding the WCJ finding, award and order of May 1, 2001. (Cal. Const., art. XIV, sec.4 **(APPENDIX K)** ; Labor Code Sections 111; 132a; **(APPENDIX J)** 133; 3201; 3202; 5300; 5301; 5950; 5952; Board Rule 10348.
- Even though he filed grievances with his union, and satisfied all of his requirements to receive due process, he was denied an administrative hearing as outlined in his Labor Code 132a Claim. **(APPENDIX J)**
- The stipulation by the defendant establishes beyond doubt that defendant's contention that the fitness for duty evaluation clearance from Dr. Randall Smith, psychiatrist, before Applicant was allowed to return to full duties was a good faith effort to determine whether he was capable of doing his job is totally without merit and this court should find that his dismissal from City employment for failure to get a medical clearance was pretextual. **(APPENDIX M)**

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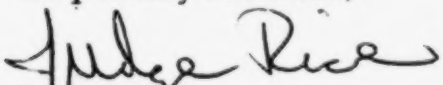
CONCLUSION

The petition for a writ of certiorari should be granted as to each question raised.

Respectfully submitted,



Judge Rice,
pro se Plaintiff/Petitioner

JUDGE RICE
1358 Washington Blvd.
Concord, CA 94521
Phone 925-672-3314
In Pro Se
Plaintiff/Petitioner

S102396
IN THE SUPREME COURT OF CALIFORNIA
En Banc

JUDGE RICE, Petitioner,

v.

WORKERS COMPENSATION APPEALS BOARD,
CITY OF OAKLAND, Respondent.

Petition for review DENIED.

SUPREME COURT
F I L E D
FEB 13 2002
Frederick K. Ohlrich Clerk
Deputy

Court of Appeal, First Appellate District, Division Four –
No. A096159

"s/GEORGE".
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FOUR
A096159
(WCAB Case No. OAK 0225232)

JUDGE RICE, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
CITY OF OAKLAND, Respondents.

En
THE COURT:

The petition for writ of review is denied.

Dated: NOV 13 2001

FILED
Court of Appeal - First App. Dist.
NOV 13 2001
By RON D. BARROW, CLERK
DEPUTY

"s/REARDON, ACTING P. J."

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

OPINION AND DECISION AFTER RECONSIDERATION

Case No. OAK 0225232

JUDGE RICE, Applicant
vs.
CITY OF OAKLAND;
GATES MCDONALD & COMPANY,
Defendant(s).

The Appeals Board granted reconsideration of the Findings of Fact, Award and Order of May 1, 2001, wherein it was found that defendant unlawfully discriminated against applicant in violation of Labor Code section 132a. An award issued against City of Oakland for an increase in employee compensation by one half, in no event to exceed more than $10,000.00; together with costs and expenses not to exceed $250.00; entitlement to lost wages for the period June 27, 1997 to date (May 1, 2001), less credit for Employment Development Department (EDD) payments and retirement benefits Applicant was ordered to be reinstated in his position as a jailer by the City of Oakland.

Defendant, City of Oakland, contended that (1) its action in requesting applicant to undergo a fitness for duty medical evaluation, subject to termination, necessitated by the realities of doing business did not violate Labor Code section 132a because the employer had a legitimate concern for the safety and well being of the applicant and his co-workers; (2) Labor Code section 132a was not violated when it terminated applicant for failure to follow a direct order to attend the lawful and legitimate fitness for duty evaluation, insofar as applicant was fully aware of the consequences of the failure to attend, and nonetheless repeatedly refused the

employer's request, ignored the advise of his union representative and attorney; and (3) applicant is not entitled to reinstatement and back wages because he refused the employer's reasonable accommodation, does not want to return to work, has elected to retire, has made no diligent effort to find employment, and refuses to accept employment. Defendant sets forth that applicant's supervisor referred applicant for a fitness for duty evaluation out of concern for applicant's well being and the safety of others while he was employed as a correctional officer and ultimately applicant was terminated for failure to attend the examination.

Reconsideration was granted in order to allow the Board to further study the case facts and applicable law. The Board has now completed its study and based upon our review of the record, and for the reasons stated herein, we will rescind the WCJ's decision, and substitute therefore a decision after reconsideration finding that the employer did not violate Labor Code section 132a insofar as the workers' compensation case played no part in the termination.

The record reflects that applicant was terminated as a correctional officer on October 24, 1997, after refusing to submit to an examination by Dr. Randall Smith, Ph.D., at the June 25, 1996 request of the city physician, Dr. Fred Blackwell. After numerous attempts to have applicant attend an evaluation by Dr. Smith, applicant was terminated for insubordination.

At the hearing of July 21, 1999, Lieutenant Lawrence Green, testified:

"In connection with the fitness for duty evaluation, the request was to see if applicant was able to function in his job because of stress-related factors. The way that the fitness for duty exam is handled is that it is made through the City physician. Personnel wanted the exam. He understood that Mr. Rice was seen by the City physician who requested a medical evaluation. Applicant had already passed a return-to-

work evaluation for his knee problem. He understood that the evaluation of the knee problem was a mistake. He understood that the applicant should have been evaluated for [the] stress claim."

He further testified that there was a letter of March 28, 1997 addressing the personnel problem regarding applicant's time off for stress. On June 4, 1997, there was a complaint of applicant having internal bleeding. On July 17, 1997 applicant was advised regarding losing time from work. Lieutenant Green testified that applicant had been cleared to return to work for his knee on June 12, 1997, but that they needed a psychiatric clearance in order for him to return to work. Lieutenant Green stated that on June 25, 1997, applicant was notified by Dr. Blackwell that he was to see a psychologist because he has a stress related psychiatric claim. Dr. Blackwell, is a city physician and refers patients to another specialist when there is a stress related claim. Lieutenant Green understood applicant was not cooperating in the referral. He further testified:

"...He was off work and therefore his absence from work was considered unauthorized because he wasn't cooperating with the referral from the city physician. On June 26, 1997 applicant was advised of this when he was told he was being put on a non-pay status for his un-authorized absence from work.

"Lieutenant Green had brief conversations with Mr. Rice. Mr. Rice said he understood the June 26, 1997 letter. His conclusion was that Mr. Rice was not cooperating.

"...

"Lieutenant Green next tried to resolve the matter by contacting applicant in July. A letter was sent certified mail and regular mail. It told the applicant that he had to see Dr. Smith. This occurred in mid-July.

"In September they had a further conversation. At that point Deputy Krauss informed Lieutenant Green that he did not know why Mr. Rice would not see Dr. Smith as required. Another effort to get Mr. Rice to see the psychologist was made. There had been no response to the July effort. Lieutenant Green had seen the letter from Dr. Blackwell because of the significance of the cooperation required. He understood there was a referral from Dr. Blackwell to Dr. Smith. This occurred in June at the time of the fitness for duty exam. He understood that Mr. Rice would make the appointment with Dr. Smith. When it hadn't been done by June 27th, he concluded that Mr. Rice was absent without authorization.

"This was followed up by the certified letters in July. There were no responses from applicant in July. There were other letters from the deputy chief scheduling appointments for applicant to see Dr. Smith."

The documentary evidence in the record supports this testimony. In a memorandum, dated June 26, 1997, from Lieutenant Green to the personnel section, Lieutenant Green requested that applicant be sent to the city physician for an evaluation of his mental fitness for duty because applicant had a continuing problem of stress resulting in significant time lost from work. It appeared that applicant's mental health may be deteriorating, posing a potential threat to his safety and the safety of others.

Next, on June 26, 1997, Lieutenant Green sent a memorandum to applicant stating:

> "On Jun 97, (sic) you were required to submit to an examination by the City Physician to determine your mental fitness for duty. You refused to cooperate with the City Physician or to accept a referral to a psychiatrist. You are therefore not permitted to return to duty until you receive clearance from the City Physician. Your status is unauthorized leave-no pay because your failure to cooperate with City Physician has made you unavailable for duty. Your continued insubordination and refusal to cooperate with the City Physician will result in a recommendation for termination."

Lieutenant Green wrote another memorandum on June 26, 1997 to the personnel section to reschedule applicant's fitness for duty evaluation with the city physician because he failed to cooperate on June 25th and is now on an unauthorized leave/no pay status.[1] He informed personnel that he personally notified applicant that his continued insubordination and failure to cooperate with the city physician would result in a recommendation for termination. (See applicant's exhibit A-82 admitted into evidence on August 29, 2000.)

The record further reflects that on July 2, 1997, Dr. Fred Blackwell wrote a letter regarding applicant's refusal to accept the referral to Dr. Randall Smith for the psychological assessment from the standpoint of being fit for duty.

On July 21, 1997, Lieutenant Green again wrote to applicant informing him that his continued insubordination would result in a recommendation for termination and that he

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[1] On June 25, 1997, applicant was placed on leave because of insubordination.

must the accept the referral to Dr. Smith or attend an appointment with the city physician.

Next, on September 3, 1997, Deputy Chief of Police, David L. Krauss, wrote a letter to applicant again directing him to report to Dr. Randall Smith for an examination on September 9, 1997, and that failure to report as directed would constitute insubordination resulting in further disciplinary action.

On September 26, 1997, Deputy Chief of Police Krauss again wrote a letter to applicant informing him of his intention to recommend to the Chief of Police that applicant be terminated from the Oakland Police Department for insubordination in his performance of his duties. Applicant was informed of his right to respond orally, or in writing or both, by October 10, 1997.

Finally, on October 17, 1997, the Director of Police Services, Mr. Joseph Samuels, recommended termination of applicant to the Office of the City Manager.

On October 24, 1997, applicant was notified by the interim city manager, Ms. Delores E. Blanchard, that he was terminated from his position of correctional officer resulting from the fact that on September 9, 1997, he disobeyed a written order to report to Dr. Randall Smith, at the direction of the City Physician, for an evaluation of his fitness for duty.

Turning to the statutory authority, Labor Code section 132a provides, in pertinent part:

> "It is the declared policy of the state that there should not be discrimination against any workers for an injury in the course and scope of their employment.

"(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation

with his or her employer or an Application for Adjudication of Claim...is guilty of a misdemeanor and the employee's compensation shall be increased by ½, but in no event more than ten thousand dollars ($10,000.00), together with costs and expenses not an excess of two hundred fifty dollars ($250.00). Any such employee shall also be entitles to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

In *Jusdon Steel Corp. v. Workers' Comp. Appeals Bd.* (Maese) (1978) 22 Cal.3d 658, 669, [43 Cal.Comp.Cases 1205] the California Supreme Court held that Labor Code section 132a prohibits the employer from arbitrarily taking action against his employee on the sole basis that the employee sustained an industrial injury. (See also, Western Electric Company v. Workers' Comp. Appeals Bd. (1979) 88 Cal.App.3d [144 CalComp.Cases 1145].) The Court in Judson Steel Corp. stated:

"In the present case the Workers' Comp. Appeals Bd. Has interpreted section 132a as expressing a policy opposing *all* discrimination against workers based solely on their having been injured in the course of employment. In light of our rule that the object which a statute seeks to achieve and the evil which it seeks to prevent are of prime consideration in the statute's interpretation (Freedland v. Greco (1955), 45 Cal.2d. 462, 467 [289 P.2d 463]), we uphold the board's conclusion: The policy of protection which the workers' compensation laws declare can only be effectuated if an employer may not discharge an employee because of the employee's absence from his job as the consequence of an injury sustained in the course and scope of employment." (Id. 1211-1212).

A worker proves a violation Section 132a by showing that as a result of an industrial injury, the employer engaged in conduct detrimental to the injured worker. If the worker makes this showing, the burden shifts to the employer to show that is conduct was necessitated by the realities of doing business. (*Barnes v. Workers' Comp. Appeals Bd.* (1989) [54 Cal.Comp/Cases 433, 437].)

In this case, applicant has failed to establish that the employer engaged in detrimental conduct on the sole basis that applicant filed a workers' compensation claim or but for the claim of industrial injury there would have been no adverse action. (*Judson Steel Corp., supra.*) Thus, the WCJ incorrectly analyzed the facts and the applicable law when he stated at page 12 of his Report and Recommendation, that all you need to show is a relevant industrial injury and a related adverse action by the employer.

Here, it was applicant himself who failed to obtain a medical release or attend a fitness for duty examination to work as a jailer. In this case applicant was terminated according to civil service regulations and public policy. Again, here, the psychological examination was scheduled at the first examining physician's request, based upon applicant's acting out after his return to duty in April. Thus, but for applicant's stress related behavior and acting out and but for the civil service requirements and public policy regarding police officers working in jails, there would be no scheduling of a psychological exam and no insubordination. We are persuaded that the workers' compensation case played no part in the action by the employer, noting that the union of which applicant was a member, in essence, backed the employer. (See, (*Dominguez v. Workers' Comp. Appeals Bd.* (1988) 63 Cal.Comp Cases 1277, writ denied; *Aina v. Workers' Comp Appeals Bd.* (1998) 63 Cal.Comp Cases 181, writ denied; *McCarthy v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 534, writ denied; *Smith v. Workers' Comp. Appeals Bd.*

(1996) 61 Cal.Comp.Cases 137, writ denied; *Bergmann v. Workers' Comp. Appeals Bd.* (1989) 54 Cal.Comp.Cases 103, writ denied.)

In other words, applicant has not met his burden of proof under Labor Code section 132a. A worker proves a violation Section 132a by showing that as a result of an industrial injury, the employer engaged in conduct detrimental to the injured worker. In proving his case, it is the applicant's burden to show the detriment, the action, and its cause, which did not occur under this fact situation. (*Smith v. Workers' Comp. Appeals Bd.* (1984) [49 Cal.Comp.Cases 212].) If the worker makes this showing, the burden shifts to the employer to show that is conduct was necessitated by the realities of doing business. (*Barns v. Workers' Comp. Appeals Bd.* (1989) [54 Cal.CompCases 433, 437].)

In this case, the burden did not shift to the employer. If it had, defendant would have met its affirmative defense by demonstrating that given public policy and applicant's work in the jail, it had a legitimate business necessity for requesting the fitness for duty examination and for termination if that psychiatric examination was not completed, considering that applicant was a correctional officer with a stress/psychiatric claim spanning from 1989 through June 26, 1997, including outbursts at work.

For the foregoing reasons,

IT IS ORDERED as the Appeals Board's decision after reconsideration that the Findings, Award and Order of May 1, 2001, be, and the same hereby is, RESCINDED and the following SUBSTITUTED therefore:

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FINDING OF FACT

1. The employer did not violate the provisions of Labor Code section 132a in terminating applicant for insubordination.

WORKERS' COMPENSATION
APPEALS BOARD

"s/ COLLEEN S. CASEY"

I CONCUR,

"s/ JAMES C. CUNEO"
"s/ JANICE JAMISON MURRAY"

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
AUG 07 2001

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No(s). OAK 0225232

JUDGE RICE,

Applicant,

vs.

CITY OF OAKLAND and FIRM SOLUTIONS,

Defendant(s).

June 11, 2001

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Introduction

Applicant worked for the City of Oakland as a jailer from 1989 to June 26, 1997. He retired on October 26, 1997. He and his employer have fully litigated multiple employment discrimination and disability-related issues in both State and Federal courts. They have also litigated four workers' compensation claims with appellate review sought on previous occasions. The now final Findings and Award of November 2, 1999 disposed of applicant's petition to reopen his February 1993 left knee and heel injury (OAK 0213148), his November 13, 1991 bite injury (WCK 0041017), his cumulative stress claim between 1989 and June 26, 1997 (OAK 0225232), his February 27, 1997 gastrointestinal case (WCK 0041016) and his June 12, 1997 left knee claim (WCK 0039110). The sole remaining issue addressed in the recent May 1, 2001 decision was applicant's claim for benefits under Labor Code Section 132(a) claim in OAK 0225232

which is associated with his cumulative (psyche) stress injury through his last day of work on June 26, 1997.

By a timely petition for reconsideration, the City of Oakland seeks the Board's review of the May 1, 2001 decision awarding applicant benefits under Labor Code Section 132(a). Applicant has filed an answer.

Labor Code Section 132(a) Claim

Applicant's February 8, 1998 Amended Application for Discrimination Benefits Pursuant to Labor Code § 132(a)[1] alleges that the City, during the period April 4, 1997 to October 26, 1997, through its police department officials and supervisors, the City physician, the personnel department, the city's workers' compensation adjusting agent, and his union, conspired and did discriminate against applicant through the use of the city's "fitness for duty-medical examination process" which unlawfully forced applicant off work, and then fired him for failure to attend a improperly scheduled examination with psychologist, Randall Smith, Ph.D..

Statute Of Limitations

The one-year statute of limitations applicable to Labor Code § 132 requires that the claim be made within one year of the discriminatory acts of the date the employee was terminated. In this claim the operative facts pleaded occurred in the period between April 1997 to his termination on October 26, 1997. The February 8, 1998 claim is therefore timely. However, it is noted that the parties have a complicated litigation history in the civil courts as well as

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[1] 'A subsequent "Second Amended Labor Code § 132a claim was withdrawn by letter of June 3, 2000.

before the Board. The factual disputes go back almost a decade to 1991.

Because the Labor Code § 132a claim pleads facts occurring in 1997 and the public policy is to have such claims filed within one year, it appears that as a matter of law, earlier examples of claimed discrimination cannot support a finding of liability. For example, (1) there was substantial evidence concerning applicant's industrial bite injury of November 1991 and the consequence thereof. As a matter of law, such events, even if found to be discriminatory, could not now support a Labor Code § 132a finding after such a length of time. Thus, no finding of discrimination can be based on applicant's claimed discrimination over the City's failure to either file a police report concerning the inmate assault on him or for the City's failure to obtain an HIV examination of the jail inmate who bit applicant. (2) There was an off-duty marital dispute which involved the police department and (3) applicant claimed employer retaliation and stress arising from his claimed status as a whistle blower. Applicant testified to improper management of the jail as part of his opposition to a job reclassification plan for jailers. Applicant testified that higher paid police officers were given overtime shifts at the jail by the City rather than fill vacant jailer positions thereby running the jail inefficiently. This occurred up to April 1997 when the Grand Jury investigated the jail. Because of the time limits set on filing claims and because these prior stress allegations were not specially pleaded as part of applicant's Labor Code § 132 claim, they may not be the sole basis for such a finding of liability.

During the trial of the Labor Code § 132 claim, defendant's objections to much of the evidence on these earlier areas of testimony were overruled. These prior disputes and the evidence related to them were allowed only for the limited purpose of showing whether or not there had been a pattern and practice of treating applicant differently

from other employees. The civil litigation provided the forum for addressing liability of the City to applicant for allegations of race discrimination and American with Disability Act claims as well as acts subject to union grievances. The Board's limited jurisdiction relates only to the industrial injuries or claims thereof by applicant and the remedies, if any, are spelled out in the Labor Code. Specifically, the Labor Code § 132a claim must be measured against the facts pleaded and the evidence presented. After making findings of fact, the applicable law must then be applied.

Applicant's Pleaded Claim

Applicant's Labor Code § 132a claim has twenty paragraphs, which are identified by Roman numerals. Applicant has pleaded and proved paragraphs I through IV of his claim. He was a jailer employed by the City of Oakland who sustained a cumulative injury to his psyche. The City directed applicant to its physician, Dr. Fred Blackwell, M.D., on April 4, 1997 for a "fitness for duty" examination. On or about April 15, 1997, Dr. Blackwell cleared applicant to return to work.

Paragraphs V, XI and XII relate to the events of June 25, 1997. Applicant pleads that the City maliciously forced him to return to Dr. Blackwell for another fitness for duty examination. At the examination, Dr. Blackwell told applicant he was being referred to Dr. Smith and that Dr. Blackwell's office would schedule the psychological examination. Thereafter, the City manipulated the rules and policies of its personnel manual to force applicant into unauthorized leave pending Dr. Smith's examination.

The undisputed facts are clear that applicant went to the examination with Dr. Blackwell on June 25, 1997. Dr. Blackwell revoked the earlier April 4, 1997 fitness for duty clearance. There was discussion of a referral to Dr. Smith. Applicant claims Dr. Blackwell's office was to schedule the

psychiatric examination. The City pointed out that applicant first refused to accept the referral to Dr. Smith and then refused to schedule or attend the examination on the grounds that it was improper and he had not been advanced mileage expenses. After the lengthy trial on regular issues, I found:

> "On June 25, 1997, applicant saw Dr. Blackwell. There was a fitness for duty exam related to his stress claim. Dr. Blackwell informed applicant that he was going to refer applicant to a psychologist, Dr. Randall Smith in San Francisco. Applicant told Dr. Blackwell that he would not attend such an examination. Dr. Blackwell immediately notified the City of the applicant's response." (See November 2, 1999 Opinion on Decision at page 5, second paragraph).

Applicant amplifies his allegation that the City misused its "fitness for duty" procedures by ignoring the release to return to work from his treating psychologist, Dr. Kuwatani who had previously released him back to work. The City's response was that the events of early June 1997 required an updated medical review.

Paragraphs VI and VIII allege that applicant had been illegally subjected to several prior psychiatric evaluations according to the City Charter, and that the City was prohibited by PJWC Judge George Mason from additional psychiatric examinations. And paragraph VIII pleads that on October 10, 1997, Judge Mason directed applicant and the City to seek a medical evaluation by Dr. Lawrence Petrakis, M.D.. It is clear that the City relied on Personnel Rule 8.02 (h) for ordering the June 25, 1997 fitness for duty examination with Dr. Blackwell and the subsequent examination with Dr. Smith. While there is a dispute over who should have set up the examination and transportation costs,it is clear that applicant knew or should have known of

the City's request for the second examination scheduled for September 7, 1997 exam with Dr. Smith and did not keep the examination. As the prior November 2, 1999 Opinion on Decision states at pages 5-6:

> "The problem became more complicated when applicant failed to keep the appointment set for July 16, 1999 with Dr. Smith. On July 21, 1997, Lieutenant Green wrote applicant requesting an explanation and asking if there are any mitigating circumstances. The letter was sent by regular mail and by certified mail. The certified mail returned unclaimed. Applicant denied receiving the letter. On August 7, 1997, after Lieutenant Green participated in a meeting with other department officials, he telephoned applicant's wife at home and urged her to encourage applicant to keep the medical appointment as scheduled with Dr. Smith. About the same time, applicant's union representative told applicant to keep the medical exam. This was followed by a formal appointment letter by Deputy Chief David Krause dated August 21, 1997 to Mr. Rice. It informed applicant that he was required to see Dr. Smith on September 2, 1997. The applicant contends that this letter did not reach him. Lieutenant Green recalls a telephone conversation with applicant on September 2nd in which he reminded the applicant of the appointment. Applicant denies the contact with Lieutenant Green on September 2nd On September 26, 1997, Police Chief Krause recommended applicant be terminated and on October 26, 1997,

applicant was terminated. Applicant thereafter began drawing state disability benefits. He retired effective October 26, 1997."

Applicant's allegation that Judge Mason's order prohibited the examination is not supported by the record. The minutes of the March 13, 1997 hearing before PWCJ George Mason indicates Judge Mason's willingness to sit as the judge at the proposed deposition of applicant and make discovery rulings on questions of potential relevancy and privilege. There is also discussion at the prior April 15, 1995 report by Dr. Randall Smith as well as an exam set up with Sandra Smith, Ph.D.. Judge Mason summarized the procedural dispute but issued no orders at that hearing. At the October 9, 1997 hearing, additional discovery problems were discussed with the notation that defendants would set up another examination with QME, Dr. Lawrence Petrakis, M.D. and applicant was informed of his right to a QME exam at defendant's expense. While the on-going dispute over the admissibility of Dr. Randall Smith's 1995 report continued, there was no order prohibiting such further examination. At that time no orders were made concerning Dr. Smith's report or with regard to further medical examination. During the period of the operative facts herein, April 4 1997 to October 26, 1997, there were no express WCAB orders barring applicant's examination with Dr. Smith. Applicant's refusal to attend the Dr. Smith's examination must rest either on an exception to the City's Rule 8.02 (h) or some provision barring the exam under the workers' compensation laws.

Paragraph VII alleges that the City relieved applicant from his duties (i.e., leave without pay) and singled him out for an insubordination charge and placed applicant in an unlawful indefinite unauthorized leave until he submitted to a psychological examination with Dr. Smith. The City did relieve applicant from his duties and placed him in an unauthorized leave status. The City took applicant off work

pending a release to return to work from the City physician, or his delegate Dr. Smith, and applicant refused to attend Dr. Smith's examination. Again, I find no order in the Board's file from PWCJ Mason prohibiting the City from scheduling or ordering applicant to attend the September 7, 1997 examination with Dr. Smith.

Paragraph IX alleges that the City terminated applicant's employment for failure to comply with a direct order that he attend the September 7, 1997 examination with Dr. Smith. The City admits that it fired applicant on the date for such insubordination.

Paragraph X alleges that applicant was placed on unauthorized leave for being insubordinate to the City physician notwithstanding the order of PWCJ Mason. Applicant was placed on unauthorized leave on June 26, 1997 because he did not have a medical clearance to return to work and indicated at least initially to Dr. Blackwell that he would not attend an examination with Dr. Smith. Thereafter, he avoided such examination and finally refused to go to the September 7, 1997 examination.

Paragraph XII alleges the City, after June 25, 1997, coaxed Dr. Blackwell to say that applicant verbally rebuked and rebelled against the City physician by refusing openly to accept an appointment with Dr. Smith. Dr. Blackwell wrote in his July 2,1997 report as follows:

> "Judge Rice was seen in this office, June 18, 1997 by Doctor Watkins initially. He had been off work since June 12th because of an injury to his left knee and was seen in the Emergency Department at Summit on June 12th and then by his treating physician, June 12th or 13th. He was then released to resume work on June 16th, but his days off reportedly were June 16th and 17th. The patient then when seen here on the 18th was released to resume work that day and was then scheduled

to see the orthopedist on July 10, 1997.

"Mr. Rice then presented in my office to see me on June 25, 1997, related to a visit dated that had been made for him, May 21, 1997 which he did not show up to. The patient was advised with his visit of June 25, 1997 that the Department wanted an evaluation on him from the standpoint of being fit for duty. He was advised that a psychological assessment would be required and that he was going to be referred to Doctor Randall Smith.

"The patient at that time refused to accept the referral to Doctor Smith and I then advised the Department of his decision.

"On June 26th, Mr. Rice then called this office and indicated that he would be willing to see Doctor Smith and was given Doctor Smith's telephone number. He had previously seen him and indicated that he would make the appointment. We have not yet been able to confirm that he has, in fact, made an appointment."

Paragraph XIII alleges that the City manipulated its personnel manual to force applicant into an unauthorized leave by not following the custom and practice of allowing the City physician to arrange, set up future appointments, and thereafter mail appointment letters to applicant and defendants intentionally failed to do this in order to force applicant into an unauthorized leave situation. The facts already found were: (1) applicant told Dr. Blackwell he wouldn't go to see Dr. Smith and then changed his mind and said he would; (2) Dr. Blackwell wanted applicant to

schedule the appointment and the July appointment failed to happen; and (3) applicant refused to go to the September 7, 1997 appointment with Dr. Smith.

Paragraph XV alleges that Gates McDonald failed to arrange and provide transportation costs to the scheduled medical appointment. The only medical appointments Gates McDonald was involved with were the 1995 appointments with Dr. Randall Smith and Dr. Sandra Smith and those scheduled with Dr. Petrakis. During the period from April 4, 1997 to November 26, 1997 the City physician, personnel department and the police department were involved in setting up and notifying applicant of Dr. Smith's September 7, 1997 appointment.

Paragraph XVI alleges that the City coaxed Lieutenant Anderson to falsely state he called applicant to give him a direct order to keep the scheduled appointment with Dr. Smith on September 7. My understanding was that it was Lieutenant Green who made the call.

Paragraphs XVII and XVIII allege that the City used the collective bargaining agreement to hold applicant on unauthorized leave status despite his request for Skelly hearing on such grievances. The evidence shows that while applicant disagreed with his union advice, his rights were protected through the grievance process.

Paragraph XVIIII alleges the City manipulated the applicant's union by way of Leo Handy and Margaret Cunningham to deny, spurn, delay and destroy applicant's grievance rights by failure to take his grievance to the fourth step using an independent arbitrator. The union contract provides that such fourth step is allowed only if both sides agree. The City did not agree and without its consent, the fourth stage independent arbitrator provision is not possible. Paragraph XX alleges the City's termination of applicant was "nothing other than an attempt to discriminate against applicant for filing his application for workers' compensation benefits. The City's denial is based on its (APPENDIX – D-10)

assertion that applicant refused to follow a direct order to attend Dr. Smith's examination and that it was his refusal to follow the direct order which motivated it to termination. On first review, it appears that the malicious and/or bad motivation by his supervisors would be in response to applicant's grand jury testimony rather than his filing a workers' compensation claim.

Applicant's Post-Trial Position

Applicant filed a 51-page closing statement which addresses his interpretation of the evidence presented and his arguments in support of his claim. Applicant's position after trial is stated on pages one and two of his closing statement. He points out he has an industrial stress claim and that the City's conduct was detrimental to him, i.e., putting him on unauthorized leave and then terminating him.

He asserts that the City's business necessity defense was not established where the employee was ultimately cleared to return to work by both Dr. Petrakis and Dr. Goldmacher. He asserts the decision to terminate him was based on fabricated and false evidence while his testimony is consistent and honest. He points to the topics he has brought to the Board's attention. Under the heading Adverse Employment Actions and Conduct Detrimental to Applicant are listed: Denial of Workers' Compensation Benefits, Bad Faith Fitness for Duty Evaluations, Malicious Application of Personnel Rule 8.02 (h) in Bad Faith, Unauthorized leave-no pay, Termination, Denial of Due Process Rights, Bad Faith Reclassification Plan, Bad Faith in the Attempted Denial of Unemployment Benefits, Abuse of Authority, Malfeasance; Misfeasance; Nonfeasance, Falsification of Evidence; Spoilation of Evidence, Slander and Perjury.

Defendant's Closing Brief

Defendant's Post-Trial Brief dated February 26, 2000 erroneously listed Case No. WCK 0039110 on its masthead and was misdirected to that closed filed rather than to OAK 0225232 which is the only file which remains active and which is the subject of the Labor Code Section 132(a) claim. Although it reached the file after the decision issued, its arguments remain germain.

Defendant starts out by restating the results of the Federal and State civil case, which ended without affording applicant any affirmative relief. Defendant argues that to the extent that applicant has been unsuccessful in these actions, the doctrine of res judicata applies and that many of applicant's allegations are of subjects outside the Board's jurisdiction. Defendant argues the Board is precluded from further litigation on these issues, including: (1) race discrimination; (2) discrimination under the American with Disabilities Act; (3) union representation issues; and (4) whistleblower activities. Two incidents discussed in this context are the 1991 bite incident ant the failure to obtain an HIV exam of the jail inmate and/or the failure to file a police report documenting the incident.

The remainder of the post trial brief addresses the 1997 "fitness for duty" examination process including the union intervention and finally, applicant's termination for insubordination. Defendant's last point is that the applicant is not entitled to back pay if a Labor Code Section 132(a) violation is found.

Prima Facie Standards For Labor Code Section 132 Claim

As the decision notes, the basic standards for a finding of discrimination under Labor Code §1 32a are becoming clear. The statute is liberally construed and does not require a finding of malicious or discriminatory intent. Rather, the prima facie case is set forth by showing a relevant industrial injury and related adverse action taken by the employer.

Applicant has met his initial burden by establishing an industrial psyche claim. It was found, based on the opinions of Dr. Petrakis and Dr. Donald Goldmacher, M.D. that applicant sustained an injury to the psyche. While no current industrial permanent disability was found, it was believed applicant had a preexisting emotional disability of a slight nature, which might rate about 14%. Applicant was allowed further medical care based on Dr. Goldmacher's opinion. The related adverse action was placing applicant on unauthorized leave without pay or temporary total disability and termination for insubordination because he failed or refused to keep an appointment for a psychological examination with Dr. Randall Smith, Ph.D. during the summer of 1997. Dr. Smith previously examined applicant at the City's third party administrator's request for a February 15, 1995 stress claim.

Business Defense

In response to the City's assertion of a business necessity defense, applicant allege that the fitness for duty examination process in the Summer of 1997 resulting in his October 1997 termination was a sham by which the City, for malicious intent, sought to put him on unpaid unauthorized leave, and then terminated him because of his industrial claim. The City has defended itself by offering evidence that applicant was placed on unauthorized leave for failure to obtain a medical release showing he was fit for duty by the City physician and he was terminated for his refusal to follow a direct order that he attend a properly scheduled September 7, 1997 examination with Dr. Smith.

Its defense asserts a business necessity of allowing only "medically cleared for duty" employees to work in its jail which is by its very nature a dangerous and stressful place. The City's position is that following the locker incident in early June 1997, applicant's supervisor responded to applicant being off work for a couple of days on stress by

properly requiring a medical clearance for return to duty to be sure applicant was able to safely return to work in the City's jail.

Parallel Legal Systems

In this case, there were at least three parallel systems at work at the same time. The first for our purposes is the workers' compensation system, which is normally initiated by the formal notice claim. Here, it started with a DWC-1 dated February 15, 1995 alleging a stress claim. It was followed by a duty to investigate the claim and within 90 days make a decision to accept or reject the claim no later than the 90th day. Since applicant was unrepresented, as part of the medical investigation, he should have been sent to a QME for an industrial evaluation (AOE-COE). Here, in addition to his other workers' compensation claims, this application for claim alleged a February 15, 1995 psyche injury resulting from "intentional infliction of emotional distress" with an attached DWC- 1 dated February 15, 1995 indicating that the injury was ongoing. In the November 1999 Findings and Award, the injury date was amended by the Board to include applicant's entire employment from 1989 to June 27, 1997.

The second parallel system is that mandated by the Oakland City Charter and the City's personnel manual which provides for the fitness for duty examination referred to above, and specifically the section 8.02(h) examination process.

The third parallel system is that provided by the labor-management agreement between the City and its employees.

Fortunately, the other parallel systems represented by applicant's civil actions appear to have been exhausted without direct impact on this claim except that document from applicant's civil litigation have been accepted into evidence generally under the rubrics of judicial notice.

Does Workers' Compensation Preempt The City Personnel Action

The first determination which must be made is whether the state industrial injury process which was authorized by the California State Constitution preempts the parallel system mandated by Oakland City Charter, its personnel rules or its labor-management agreements.

I know of no statutory or case law doing so, and therefore must assume that the parallel "fitness for duty examination process" and special provisions mandated by the City through its collective bargaining unit are lawful. The City's defense is that is provisions for such fitness for duty examinations were obstructed by applicant's refusal to attend Dr. Smith's evaluation and that his refusal to attend the September 7,1997 examination was a direct insubordination. The City points out that applicant was advised of this by his union representative. It is the City's position that this process is independent and outside the workers' compensation system and therefore cannot be the subject of a Labor Code §132a claim.

Defendant's Petition for Reconsideration

Defendant's Petition for Reconsideration raises three questions for the Board to consider. Applicant's answer discusses each of these questions in detail. In view of the size of applicant's files (two storage boxes) and because the file has been before the Board twice already, the issues raised by defendant's petition will be discussed in the same order:

I. Did Employer Action In Requesting Applicant To Undergo A Fitness For Duty Evaluation, Subject To Termination, Necessitated By The Relaities Of Doing Business Violate Labor Code Section 132(a) Where Employer Had A Legitimate Concern For The Safety And Well Being Of The Applicant And His Co-Workers.

The first issue was resolved in the City's favor. It was held that the employer was entitled to a fitness for duty exam as a reasonable business need. Under its personnel rules, the City was entitled to such an examination in spite of applicant's release to duty slip from his treating psychologist, Dr. Kuwatani. As noted in the opinion on decision under the heading Business Defense, applicant's supervisor, Lt. Green, responded to applicant being off work on "stress" following the locker incident by seeking a medical clearance to assure that applicant was able to safely return to the dangerous work of a jailer. The legal basis for such a medical examination is set forth in the City's Personnel Procedures, specifically the so-called Section 8.02(h) examination. This separate parallel systems of the City's personnel procedure provide for the examination through the City Physician's Office and discipline up to and including termination as a means of enforcement of the City procedures.

II. Did Employer Action Violate Labor Code Section 132 In Terminating Applicant For Failure To Follow A Direct Order To Attend A Lawful And Legitimate Request For A Fitness For Duty Evaluation Where Applicant Was Fully Aware Of The Consequences Of His Failure To Attend, And Nonetheless Repeatedly Refused And Ignored The Employers Request That He Attend And The Advise Of His Union Representatives And Its Attorney To Attend The Examination Subject To Termination.

Dr. Smith's Examinations

Normally, the parallel legal systems do not cross and each system provides for due process with suitable appeal and review. In this case, the City's third party administrator first chose to use Dr. Randall Smith, Ph.D. as a defense medical examiner for applicant's workers' compensation case. (See Gates McDonald's appointment letters of March 27, 1995, Dr. Randall Smith's March 30, 1995 examination

and its December 12, 1995 request that applicant see Dr. Sandra Smith, Ph.D. as their examiners for his February 15, 1995 claim). Dr. Randall Smith and Dr. Sandra Smith clearly became industrial examiners for some purposes, and in this process generated Dr. Randall Smith's April 15, 1995 report.

The question must then be addressed as to whether a subsequent referral by the City physician for an examination by Dr. Randall Smith in the context of a fitness for duty situation brings the two separate parallel legal syatems together.

My reading of this file shows that Dr. Smith was an AOE/COE examiner for the 1995 industrial claim. This is further complicated because of Dr. Smith's April 30, 1995 report was excluded from the evidence because the City refused to provide applicant with materials shown to Dr. Smith which influenced Dr. Smith's 1995 opinion. I assume, although it is not specified in the record, that the City's denial of applicant's psyche claim was based in part on that excluded report. Applicant's reluctance to return to Dr. Smith seems obvious. While PWCJ Mason dealt with applicant's denied psyche claim among others, in 1996 defendant sought a new psyche examiner, Dr. Lawrence Petrakis. Applicant ultimately kept this examination as is noted above by Dr. Petrakis and Dr. Donald Goldmacher's opinion supporting a finding of industrial injury to the psyche.

The City physician's referral of applicant to Dr. Smith in June 1997 ignores the history of a prior dispute over Dr. Smith's April 30, 1995 report, which was pending before the Board during 1996 and 1997 and undoubtedly, created much of the controversy which was discussed with PWCJ Mason before the case was assigned to me for trial. My decision after trial on the regular issues was that while applicant may not have wanted to go to Dr. Smith again, the City had a parallel system which authorized the examination based on the City's need to provide a safe jail.

However, in the trial of the Labor Code § 132a claim, a different and stricter standard is used. It is not whether such an examination with Dr. Smith was lawful but whether its use was adverse and discriminatory in fact, regardless of the City's intent. If it was, then applicant prevails. If it was not, then the City prevails.

At the time of my May 1, 2001 decision, I located no cases which directly addressed the subject. Now that the City's closing brief and its Petition for Reconsideration have reached the file, the City's position remained that "the referral from the City's Physician, Dr. Blackwell, was a good faith personnel action conducted for legitimate non-discriminatory business reasons." (Defendant's Post-Trial Brief Re: Labor Code Section 132a, p. 9, lines 2-4).

Applicant's response to this point is that there was never a proper referral to Dr. Smith under Personnel Rule 8.02(h) (see applicant's answer, pp. 12-14.) I disagreed with applicant's vigorously put forth position. I previously held that he knew or should have known that there was an exam set up with Dr. Smith on September 2, 1997 and chose not to attend. While applicant asserts Lt. Green had ill will against him over applicant's objection to the staffing of the jail with high paid police officers earning overtime, I did not make that finding and do not believe the record supports it. Lt Green appeared to testify truthfully and denied ill will towards applicant. Lt. Green testified applicant did a good job as a jailer. On this point the opinion states:

Therefore, under the facts as I understand them, it appears that the City's request for the fitness for duty examination in June 1997 followed several day off work by the applicant. Applicant went off work because he was upset over clothes being taken from his locker and associated that with retaliation for his testimony before the Grand Jury in which he took a position against the jail personnel reclassification

and against police officers working vacant shift at overtime pay when the City could fill vacant jailer positions for less cost. Both applicant and his supervisor testified applicant did his job well. After his industrial knee injury, he was able to successfully work in the jail's front office in a modified position. The fitness for duty examination falls not only within the need to assure a safe jail (i.e., a business necessity defense) but also to deal with a pending workers' compensation stress claim. Lieutenant Green indicated he did not know the reason for applicant's stress only that he "hit off' on stress for a couple of days and he wanted to be sure applicant was fit for duty. In the context of the period of June 1997, there does not appear to be a non-work reason for applicant's stress. Certainly, he had previous non-stress and even a preexisting emotional disability, but these causes were not established as being the cause of his June 1997 stress absences. On this record, I find that his stress absence in June 1997 were industrial and that Dr. Smith's examination cannot be excluded from the workers' compensation process. Under California workers' compensation, there is no acceptable procedure for taking applicant off work, without the availability of sick leave, and without temporary total disability under such circumstances. Further, to require applicant to attend a further examination with Dr. Smith, where his opinion has been tainted by previously sending him documentation which would not be acceptable under the workers' compensation system, appears unfair. The use of the police chain of command to order attendance at an unsuitable examination is adverse and discriminatory. The applicant has established his claim on the record.

I remain of the opinion that it was discriminatory to require applicant to go back to Dr. Smith a second time when his opinion was already tainted and his previous report excluded because the City would not share with applicant the investigative material which it forwarded to Dr. Smith at the time of his earlier April 1995 exam.

III. Is Applicant Entitled To Reinstatement And Back Wages Where He Refuses The Employers Reasonable Accommodations, Does Not Want To Return To Work, Has Elected To Retire, Has Made No Diligent Effort To Find Employment and Refuses To Accept Employment.

The statutory remedy for a Labor Code Section 132(a)(1) claim is:

"Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000.00), together with costs and expenses not in excess of two hundred fifty dollars ($250.00). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

Applicant was awarded increase of benefits by one half and in no event more than ten thousand dollars ($10,000.00) together with costs not to exceed $250.00. He was also awarded lost wages from June 27, 1997 to date less credit for EDD payments and retirement benefits. Defendant on appeal argues that back pay is inappropriate and bases its argument on the fact applicant did not wish to pursue his

ADA claim and did not want to work for the City after his retirement. This conflicts with the relief sought by his Labor Code Section 132(a) claim dated February 6, 1998 which reads:

> "Wherefore, applicant respectfully requests that he be awarded the benefits provided by California Labor Code Section 132(a) including increased compensation, reinstatement, and reimbursement for lost wages and work benefits caused by defendant's act."

While it is true applicant testified he looked for work, it is also true the City denied his state disability benefits, and took the retirement benefits only after the City refused to take him back without Dr. Smith's release to work. The City had released to work opinions from Dr. Kuwatani, his treater, Dr. Petrakis and Dr. Goldmacher. No offer of reinstatement was ever offered. The back wages are due applicant under Labor Code Section 132(a).

Recommendation

It is respectfully recommended that defendant's petition for reconsideration be denied.

Respectfully submitted,

"s/RICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

Filed and Served by Mail on 6-11-2001, on All Persons Listed on the Official Address Record.
By: "s/Ruben Marquez"

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No(s). OAK 0225232

JUDGE RICE,

Applicant,

vs.

CITY OF OAKLAND and FIRM SOLUTIONS,

Defendant(s).

Finding Of Fact, Award And Order

The above-entitled matter having been heard and regularly submitted, Richard W. Kirby, Workers' Compensation judge, now makes his decision as follows:

FINDING OF FACT

1. Defendant City of Oakland unlawfully discriminated against applicant in violation of Labor Code section 132a.

AWARD

AWARD IS MADE in favor of applicant against the CITY OF OAKLAND of

(a) An increase in employee compensation herein by one half and in no event more than ten thousand dollars, together with cost and expenses not to exceed $250.00.
(b) Entitlement to lost wages for the period June 27, 1997 to date, less credit for EDD payments and retirement benefits.

ORDER

IT IS ORDERED that applicant be reinstated to his position as jailer by the City of Oakland.

"s/RICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

Filed and Served by Mail on
May 1, 2001 on All Persons
Listed on the Official Address Record.
By:__Ruben Marquez

WCAB Case No. OAK 0225232
RICHARD W. KIRBY
WORKERS' COMPENSATION JUDGE

JUDGE RICE
V.
CITY OF OAKLAND and FIRM SOLUTIONS

OPINION ON DECISION

Introduction

Applicant and his employer, the City of Oakland, have litigated multiple workers' compensation claims. The last Findings and Award of November 2, 1999 disposed of his petition to reopen his February 1993 left knee and heel injury (OAK 0213148), his November 13, 1991 bite injury (WCK 0041017), his cumulative stress claim between 1989 and June 26, 1997 (OAK 0252232), his February 27, 1997 gastrointestinal case (WCK 0041016) and his June 12, 1997 left knee claim (WCK 0039110). The only remaining issue is his Labor Code § 132a claim in Case No. OAK 0152232 which is cumulative stress claim.

Applicant's February 8, 1998 Amended Application for Discrimination Benefits Pursuant to Labor Code § 132(a)[1] alleges that the City, during the period April 4, 1997 to October 26, 1997, through its police department officials and supervisors, the City physician, the personnel department, the city's workers' compensation adjusting agent, and his union, conspired and did

[1] A subsequent "Second Amended Labor Code § 132a claim was withdrawn by letter of June 3, 2000.

discriminate against applicant through the use of the city's "fitness for duty-medical examination process" which unlawfully forced applicant off work, and then fired him for failure to attend a improperly scheduled examination with psychologist, Randall Smith, Ph.D..

The one-year statute of limitations applicable to Labor Code § 132 requires that the claim be made within one year of the discriminatory acts of the date the employee was terminated. In this claim the operative facts pleaded occurred in the period between April 1997 to his termination on October 26, 1997. The February 8, 1998 claim is therefore timely. However, the complicated history revealed in his extensive litigation with his employer both in the civil courts as well as before the Board go back almost a decade. Because the Labor Code § 132a claim pleads facts occurring in 1997 and the public policy is to have such claims filed within one year, it appears that as a matter of law, earlier examples of claimed discrimination cannot support a finding of liability. For example, (1) there was substantial evidence concerning applicant's industrial bite injury of November 1991 and the consequence thereof. As a matter of law, such events, even if found to be discriminatory, could not now support a Labor Code § 132a finding after such a length of time. Thus, no finding of discrimination can be based on applicant's claimed discrimination over the City's failure to either file a police report concerning the inmate assault on him or for the City's failure to obtain an HIV examination of the jail inmate who bit applicant. (2) There was an off-duty marital dispute which involved the police department and (3) applicant claimed employer retaliation and stress arising from his claimed status as a whistle blower. Applicant testified to improper management of the jail as part of his opposition to a job reclassification plan for jailers. Applicant testified that higher paid police officers were given overtime shifts at the jail by the City rather than fill vacant jailer positions thereby running the jail inefficiently. This occurred up to April 1997 when the Grand Jury investigated the jail. Because of the time limits set on filing claims and because these prior stress allegations were not specially pleaded as partof

applicant's Labor Code § 132 claim, they may not be the sole basis for such a finding of liability.

During the trial of the Labor Code § 132 claim, defendant's objections to much of the evidence on these earlier areas of testimony were overruled. These prior disputes and the evidence related to them were allowed only for the limited purpose of showing whether or not there had been a pattern and practice of treating applicant differently from other employees. The civil litigation provided the forum for addressing liability of the City to applicant for allegations of race discrimination and American with Disability Act claims as well as acts subject to union grievances. The Board's limited jurisdiction relates only to the industrial injuries or claims thereof by applicant and the remedies, if any, are spelled out in the Labor Code. Specifically, the Labor Code § 132a claim must be measured against the facts pleaded and the evidence presented. After making findings of fact, the applicable law must then be applied.

Applicant's Pleaded Claim

Applicant's Labor Code § 132a claim has twenty paragraphs, which are identified by Roman numerals. Applicant has pleaded and proved paragraphs I through IV of his claim. He was a jailer employed by the City of Oakland who sustained a cumulative injury to his psyche. The City directed applicant to its physician, Dr. Fred Blackwell, M.D., on April 4, 1997 for a "fitness for duty" examination. On or about April 15, 1997, Dr. Blackwell cleared applicant to return to work.

Paragraphs V, XI and XII relate to the events of June 25, 1997. Applicant pleads that the City maliciously forced him to return to Dr. Blackwell for another fitness for duty examination. At the examination, Dr. Blackwell told applicant he was being referred to Dr. Smith and that Dr. Blackwell's office would schedule the psychological examination. Thereafter, the City manipulated the rules and policies of its personnel manual to force applicant into unauthorized leave pending Dr. Smith's

examination.

The undisputed facts are clear that applicant went to the examination with Dr. Blackwell on June 25, 1997. Dr. Blackwell revoked the earlier April 4, 1997 fitness for duty clearance. There was discussion of a referral to Dr. Smith. Applicant claims Dr. Blackwell's office was to schedule the psychiatric examination. The City pointed out that applicant first refused to accept the referral to Dr. Smith and then refused to schedule or attend the examination on the grounds that it was improper and he had not been advanced mileage expenses. After the lengthy trial on regular issues, I found:

> "On June 25, 1997, applicant saw Dr. Blackwell. There was a fitness for duty exam related to his stress claim. Dr. Blackwell informed applicant that he was going to refer applicant to a psychologist, Dr. Randall Smith in San Francisco. Applicant told Dr. Blackwell that he would not attend such an examination. Dr. Blackwell immediately notified the City of the applicant's response." (See November 2, 1999 Opinion on Decision at page 5, second paragraph).

Applicant amplifies his allegation that the City misused its "fitness for duty" procedures by ignoring the release to return to work from his treating psychologist, Dr. Kuwatani who had previously released him back to work. The City's response was that the events of early June 1997 required an updated medical review.

Paragraphs VI and VIII allege that applicant had been illegally subjected to several prior psychiatric evaluations according to the City Charter, and that the City was prohibited by PJWC Judge George Mason from additional psychiatric examinations. And paragraph VIII pleads that on October 10, 1997, Judge Mason directed applicant and the City to seek a medical evaluation by Dr. Lawrence Petrakis, M.D.. It is clear that the City relied on Personnel Rule 8.02 (h) for ordering the June 25, 1997 fitness for duty examination with Dr. Blackwell

and the subsequent examination with Dr. Smith. While there is a dispute over who should have set up the examination and transportation costs, it is clear that applicant knew or should have known of the City's request for the second examination scheduled for September 7, 1997 exam with Dr. Smith and did not keep the examination. As the prior November 2, 1999 Opinion on Decision states at pages 5-6:

> The problem became more complicated when applicant failed to keep the appointment set for July 16, 1999 with Dr. Smith. On July 21, 1997, Lieutenant Green wrote applicant requesting an explanation and asking if there are any mitigating circumstances. The letter was sent by regular mail and by certified mail. The certified mail returned

unclaimed. Applicant denied receiving the letter. On August 7, 1997, after Lieutenant Green participated in a meeting with other department officials, he telephoned applicant's wife at home and urged her to encourage applicant to keep the medical appointment as scheduled with Dr. Smith. About the same time, applicant's union representative told applicant to keep the medical exam. This was followed by a formal appointment letter by Deputy Chief David Krause dated August 21, 1997 to Mr. Rice. It informed applicant that he was required to see Dr. Smith on September 2, 1997. The applicant contends that this letter did not reach him. Lieutenant Green recalls a telephone conversation with applicant on September 2nd in which he reminded the applicant of the appointment. Applicant denies the contact with Lieutenant Green on September 2nd On September 26, 1997, Police Chief Krause recommended applicant be terminated and on October 26, 1997, applicant was terminated. Applicant thereafter began drawing state

disability benefits. He retired effective October 26, 1997."

Applicant's allegation that Judge Mason's order prohibited the examination is not supported by the record. The minutes of the March 13, 1997 hearing before PWCJ George Mason indicates Judge Mason's willingness to sit as the judge at the proposed deposition of applicant and make discovery rulings on questions of potential relevancy and privilege. There is also discussion at the prior April 15, 1995 report by Dr. Randall Smith as well as an exam set up with Sandra Smith, Ph.D.. Judge Mason summarized the procedural dispute but issued no orders at that hearing. At the October 9, 1997 hearing, additional discovery problems were discussed with the notation that defendants would set up another examination with QME, Dr. Lawrence Petrakis, M.D. and applicant was informed of his right to a QME exam at defendant's expense. While the on-going dispute over the admissibility of Dr. Randall Smith's 1995 report continued, there was no order prohibiting such further examination. At that time no orders were made concerning Dr. Smith's report or with regard to further medical examination. During the period of the operative facts herein, April 4 1997 to October 26, 1997, there were no express WCAB orders barring applicant's examination with Dr. Smith. Applicant's refusal to attend the Dr. Smith's examination must rest either on an exception to the City's Rule 8.02 (h) or some provision barring the exam under the workers' compensation laws.

Paragraph VII alleges that the City relieved applicant from his duties (i.e., leave without pay) and singled him out for an insubordination charge and placed applicant in an unlawful indefinite unauthorized leave until he submitted to a psychological examination with Dr. Smith. The City did relieve applicant from his duties and placed him in an unauthorized leave status. The City took applicant off work pending a release to return to work from the City physician, or his delegate Dr. Smith, and applicant refused to attend Dr. Smith's examination. Again, I find no order in the Board's file from PWCJ Mason prohibiting

the City from scheduling or ordering applicant to attend the September 7, 1997 examination with Dr. Smith.

Paragraph IX alleges that the City terminated applicant's employment for failure to comply with a direct order that he attend the September 7, 1997 examination with Dr. Smith. The City admits that it fired applicant on the date for such insubordination.

Paragraph X alleges that applicant was placed on unauthorized leave for being insubordinate to the City physician notwithstanding the order of PWCJ Mason. Applicant was placed on unauthorized leave on June 26, 1997 because he did not have a medical clearance to return to work and indicated at least initially to Dr. Blackwell that he would not attend an examination with Dr. Smith. Thereafter, he avoided such examination and finally refused to go to the September 7, 1997 examination.

Paragraph XII alleges the City, after June 25, 1997, coaxed Dr. Blackwell to say that applicant verbally rebuked and rebelled against the City physician by refusing openly to accept an appointment with Dr. Smith. Dr. Blackwell wrote in his July 2,1997 report as follows:

> "Judge Rice was seen in this office, June 18, 1997 by Doctor Watkins initially. He had been off work since June 12th because of an injury to his left knee and was seen in the Emergency Department at Summit on June 12th and then by his treating physician, June 12th or 13th. He was then released to resume work on June 16th, but his days off reportedly were June 16th and 17th. The patient then when seen here on the 18~ was released to resume work that day and was then scheduled to see the orthopedist on July 10, 1997.

"Mr. Rice then presented in my office to see me on June 25, 1997, related to a visit dated that had been made for him, May 21, 1997 which he did

not show up to. The patient was advised with his visit of June 25, 1997 that the Department wanted an evaluation on him from the standpoint of being fit for duty. He was advised that a psychological assessment would be required and that he was going to be referred to Doctor Randall Smith.

"The patient at that time refused to accept the referral to Doctor Smith and I then advised the Department of his decision.

"On June 26th, Mr. Rice then called this office and indicated that he would be willing to see Doctor Smith and was given Doctor Smith's telephone number. He had previously seen him and indicated that he would make the appointment. We have not yet been able to confirm that he has, in fact, made an appointment."

Paragraph XIII alleges that the City manipulated its personnel manual to force applicant into an unauthorized leave by not following the custom and practice of allowing the City physician to arrange, set up future appointments, and thereafter mail appointment letters to applicant and defendants intentionally failed to do this in order to force applicant into an unauthorized leave situation. The facts already found were: (1) applicant told Dr. Blackwell he wouldn't go to see Dr. Smith and then changed his mind and said he would; (2) Dr. Blackwell wanted applicant to schedule the appointment and the July appointment failed to happen; and (3) applicant refused to go to the September 7, 1997 appointment with Dr. Smith.

Paragraph XV alleges that Gates McDonald failed to arrange and provide transportation costs to the scheduled medical appointment. The only medical appointments Gates McDonald

was involved with were the 1995 appointments with Dr. Randall Smith and Dr. Sandra Smith and those scheduled with Dr. Petrakis. During the period from April 4, 1997 to November 26, 1997 the City physician, personnel department and the police department were involved in setting up and notifying applicant of Dr. Smith's September 7, 1997 appointment.

Paragraph XVI alleges that the City coaxed Lieutenant Anderson to falsely state he called applicant to give him a direct order to keep the scheduled appointment with Dr. Smith on September 7. My understanding was that it was Lieutenant Green who made the call

Paragraphs XVII and XVIII allege that the City used the collective bargaining agreement to hold applicant on unauthorized leave status despite his request for Skelly hearing on such grievances. The evidence shows that while applicant disagreed with his union advice, his rights were protected through the grievance process.

Paragraph XVIIII alleges the City manipulated the applicant's union by way of Leo Handy and Margaret Cunningham to deny, spurn, delay and destroy applicant's grievance rights by failure to take his grievance to the fourth step using an independent arbitrator. The union contract provides that such fourth step is allowed only if both sides agree. The City did not agree and without its consent, the fourth stage independent arbitrator provision is not possible. Paragraph XX alleges the City's termination of applicant was "nothing other than an attempt to discriminate against applicant for filing his application for workers' compensation benefits. The City's denial is based on its assertion that applicant refused to follow a direct order to attend Dr. Smith's examination and that it was his refusal to follow the direct order which motivated it to termination. On first review, it appears that the malicious and/or bad motivation by his supervisors would be in response to applicant's grand jury testimony rather than his filing a workers' compensation claim.

Applicant's Post-Trial Position

Applicant filed a 51-page closing statement which addresses his interpretation of the evidence presented and his arguments in support of his claim. I find no response from the City in the Board's file. Applicant's position after trial is stated on pages one and two of his closing statement. He points out he has an industrial stress claim and that the City's conduct was detrimental to him, i.e., putting him on unauthorized leave and then terminating him.

He asserts that the City's business necessity defense was not established where the employee was ultimately cleared to return to work by both Dr. Petrakis and Dr. Goldmacher. He asserts the decision to terminate him was based on fabricated and false evidence while his testimony is consistent and honest. He points to the topics he has brought to the Board's attention. Under the heading Adverse Employment Actions and Conduct Detrimental to Applicant are listed: Denial of Workers' Compensation Benefits, Bad Faith Fitness for Duty Evaluations, Malicious Application of Personnel Rule 8.02 (h) in Bad Faith, Unauthorized leave-no pay, Termination, Denial of Due Process Rights, Bad Faith Reclassification Plan, Bad Faith in the Attempted Denial of Unemployment Benefits, Abuse of Authority, Malfeasance; Misfeasance; Nonfeasance, Falsification of Evidence; Spoilation of Evidence, Slander and Perjury.

Prima Facie Standards For Labor Code Section 132 Claim

The basic standards for a finding of discrimination under Labor Code §1 32a are becoming clear. The statute is liberally construed and does not require a finding of malicious or discriminatory intent. Rather, the prima facie case is set forth by showing a relevant industrial injury and adverse action taken by the employer. Applicant has met his initial burden by establishing an industrial psyche claim and adverse job action, i.e., unpaid unauthorized leave and termination. Based on the opinions of Dr. Petrakis and Dr. Donald Goldmacher, M.D., no current industrial permanent disability was found although it was believed applicant had a preexisting emotional disability of a slight nature

which might rate about 14%. Further medical care was allowed on Dr. Goldmacher's opinion. On this record, the burden of proof shifts to the employer.

Business Defense

In response to the City's assertion of a business defense, applicant allege that the fitness for duty examination process in the Summer of 1997 resulting in his October 1997 termination was a sham by which the City, for malicious intent, sought to put him on unpaid unauthorized leave, and then terminated him because of his industrial claim. The City has defended itself by offering evidence that applicant was placed on unauthorized leave for failure to obtain a medical release showing he was fit for duty by the City physician and he was terminated for his refusal to follow a direct order that he attend a properly scheduled September 7, 1997 examination with Dr. Smith. Its defense asserts a business necessity of allowing only "medically cleared for duty" employees to work in its jail which is by its very nature a dangerous and stressful place. The City's position is that following the locker incident in early June 1997, applicant's supervisor responded to applicant being off work for a couple of days on stress by properly requiring a medical clearance for return to duty to be sure applicant was able to safely return to work.

Parallel Systems

In this case, there were at least three parallel systems at work at the same time. The first for our purposes is the workers' compensation system, which is normally reflected by the formal notice claim of a stress or psyche injury (sic, DWC- 1 dated 2-15-95) followed by a duty to investigate the claim within 90 days followed by a decision to accept or reject the claim no later than the 90 days. Since applicant was unrepresented, as part of the medical investigation, he should have been sent to a QME for an industrial evaluation (AOE-COE). Here, in addition to his other workers' compensation claims, this application for claim alleged a February 15, 1995 psyche injury resulting from "intentional

infliction of emotional distress" with an attached DWC- 1 dated February 15, 1995 indicating that the injury was ongoing. In the November 1999 Findings and Award, the injury date was amended by the Board to include applicant's entire employment from 1989 to June 27, 1997.

The second parallel system is that mandated by the Oakland City Charter and the City personnel manual which provides for the fitness for duty examination referred to above, and specifically the section 8.02(h) examination process.

The third parallel system is that provided by the labor-management agreement between the City and its employees. Fortunately, the other parallel systems represented by applicant's civil actions appear to have been exhausted without direct impact on this claim.

Other parallel systems are reflected by applicant's civil litigation. Documents from applicant's Federal and State actions have been accepted into evidence generally under the rubrics of judicial notice.

Does Workers' Compensation Preempt The City Personnel Action

The first determination which must be made is whether the state industrial injury process which was authorized by the California State Constitution preempts the parallel system mandated by Oakland City Charter, its personnel rules or its labor-management agreements.

I know of no statutory or case law doing so, and therefore must assume that the parallel "fitness for duty examination process" and special provisions mandated by the City through its collective bargaining unit are lawful. The City's defense is that is provisions for such fitness for duty exam were obstructed by applicant's refusal to attend Dr. Smith's evaluation and that after his refusal to attend the September 7,1997 exam was a direct insubordination and that he was advised of this by his union representative. It is the City's position that this process is independent and outside the workers' compensation system and therefore cannot be the subject of a Labor Code §132a claim.

Dr. Smith's Examinations

Normally, when the parallel legal systems do not cross, each system provides for due process with suitable appeal and review. In this case, where the City chose to use Dr. Randall Smith, first in 1995 as a defense examiner (see Gates McDonald's appointment letters of March 27, 1995, Dr. Randall Smith, Ph.D.'s March 30, 1995 examination and its December 12, 1995 request that applicant see Dr. Sandra Smith, Ph.D. as their examiners for his February 15, 1995 claim) these doctors clearly became industrial examiners for some purposes and resulted in Dr. Randall Smith's April 15, 1995 report. The question must then be addressed as to whether a subsequent referral by the City physician for an examination by Dr. Randall Smith in the context of a fitness for duty situation remains part of a separate system. My reading of this file shows that Dr. Randall Smith was a reporter for the industrial claim and that thereafter, defendant sought a new examiner, Dr. Lawrence Petrakis, starting in 1996. Certainly, applicant was resisting the examination by Dr. Petrakis and he resisted the further examination by Dr. Randall Smith. This is further complicated because of Dr. Smith's April 30, 1995 report was excluded from the evidence because the City refused to provide applicant with materials shown to Dr. Smith which influenced Dr. Smith's 1995 opinion. I assume, although it is not specified in the record, that the City's denial of applicant's psyche claim was based in part on that excluded report. Applicant's reluctance to return to Dr. Smith seems obvious. The City physician's referral of applicant to Dr. Smith in June 1997 ignores the history of a prior dispute over Dr. Smith's April 30, 1995 report, which was pending before the Board during 1996 and 1997 and undoubtedly, created much of the controversy which was discussed with PWCJ Mason before the case was assigned to me for trial. My decision after trial on the regular issues was that while applicant may not have wanted to go to Dr. Smith again, the City had a parallel system which authorized the examination based on the City's need to provide a (APP-E-15

safe jail. In the trial of the Labor Code § 132a claim, a different and stricter standard is used. It is not whether such an examination with Dr. Smith was lawful but whether its use was adverse and discriminatory in fact, regardless of the City's intent. If it was, then applicant prevails. If it was not, then the City prevails.

I have located no cases which are directly addressing the subject and clearly without a closing statement from the City, I am perplexed because to a large measure, I must rely on an educated guess as to its position. Hopefully, I have done so correctly. Applicant's position is clear. Therefore, under the facts as I understand them, it appears that the City's request for the fitness for duty examination in June 1997 followed several day off work by the applicant. Applicant went off work because he was upset over clothes being taken from his locker and associated that with retaliation for his testimony before the Grand Jury in which he took a position against the jail personnel reclassification and against police officers working vacant shift at overtime pay when the City could fill vacant jailer positions for less cost. Both applicant and his supervisor testified applicant did his job well. After his industrial knee injury, he was able to successfully work in the jail's front office in a modified position. The fitness for duty examination falls not only within the need to assure a safe jail (i.e., a business necessity defense) but also to deal with a pending workers' compensation stress claim. Lieutenant Green indicated he did not know the reason for applicant's stress only that he "hit off' on stress for a couple of days and he wanted to be sure applicant was fit for duty. In the context of the period of June 1997, there does not appear to be a non-work reason for applicant's stress. Certainly, he had previous non-stress and even a preexisting emotional disability, but these causes were not established as being the cause of his June 1997 stress absences. On this record, I find that his stress absence in June 1997 were industrial and that Dr. Smith's exam cannot be excluded from the workers' comp process. Under California workers' comp, there is no acceptable procedure for taking applicant off work, without the availability of sick leave,

and without temporary total disability under such circumstances. Further, to require applicant to attend a further examination with Dr. Smith, where his opinion has been tainted by previously sending him documentation which would not be acceptable under the workers' compensation system, appears unfair. The use of the police chain of command to order attendance at an unsuitable examination is adverse and discriminatory. The applicant has established his claim on the record.

"s/RICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FOUR
A090146
(WCAB Nos. OAK 0225232,
WCK 041016, 041017, 039110)

CITY OF OAKLAND, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and JUDGE RICE, Respondents.

THE COURT:

The petition for writ of review is denied.

(Hanlon, P. J., Reardon, J. and Sepulveda, J. participated in the decision.)

Dated: APR -6 2000

FILED
Court of Appeal - First App. Dist.
APR -6 2000
By RON D. BARROW, Clerk
Deputy

"s/ HANLON, P. J.

January 14, 2000

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case Nos. OAK 213148; **OAK 225232**; WCK 041016;
WCK 041017; WCK 039110

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

JUDGE RICE
Applicant,
vs.
CITY OF OAKLAND; GATES McDONALD & COMPANY,
Defendant(s).

Applicant, Judge Jay Rice, in propria persona, seeks reconsideration of the Findings and Award in Case No. OAK 213148, dated November 2, 1999, wherein it was found that applicant has not shown good cause to reopen his claim alleging a cumulative injury to his heels and left knee ending February 1993, while employed as a jailer for the City of Oakland. Applicant's Petition to Reopen filed January 20, 1998 was ordered denied.

Applicant contends that (1) the facts relied upon by applicant to show good cause for reopening were misinterpreted by the workers' compensation administrative law judge (WCJ); (2) he obtained newly discovered evidence from the Veterans Administration, dated October 27, 1997, demonstrating there was no treatment for left knee injury by the Veterans Administration; (3) the testimony of defense witness Mr. Vincent Chan, sergeant of police, on January 22, 1996 was false when he testified he did not recall applicant

reporting an injury to the left knee; (4) the February 10, 1993 addendum to the employer's report of occupational illness submitted by Sergeant Ronald Davis contains false statements; (5) defendant provided false and erroneous information to Dr. Thomas Leonard in a deliberate attempt to manipulate, control, direct and influence his diagnoses; (6) in his September 6, 1995 supplemental report, Dr. Bugna comments that his previous reports were incorrect and his opinion is that approximately one-half of the difficulties of applicant's left knee is attributable to the injury sustained by him during the work activities occurring on January 27, 1993, and the balance is due to multiple episodes of chronic trauma sustained by applicant while engaged in the course of his job activities subsequently.

In Case No. WCK 039110, it was found that applicant sustained industrial injury to his left knee on June 12, 1997 while employed as a correctional officer; that the injury caused temporary disability from July 10, 1997 to May 1, 1998; that applicant incurred self-procured medical expense; that applicant is not in need of further medical treatment; that applicant did not sustain permanent disability; and that EDD is entitled to reimbursement of its lien for the period overlapping the temporary disability awarded.

In WCK 039110 applicant filed a petition for reconsideration contending that (1) substantial evidence justifies finding applicant is in need of further medical treatment; (2) substantial evidence justifies finding applicant sustained permanent disability and the WCJ erred in relying on the opinion of Dr. Cabayan to disallow further medical treatment and to find permanent disability was non-industrial because Dr. Cabayan omitted, excluded, and ignored the facts of three industrial injuries, two of which resulted in the tearing of the posterior horn of the medial meniscus of the left knee; (3) Dr. Oberlander, on January 19, 1998, opined that applicant's incapacity is expected to progress throughout the years and he will require a total knee replacement

justifying a need of further medical treatment; and (4) the objective findings of Dr. Oberlander and Dr.Miranda, the two knee surgeons, in addition to the orthopedic surgeon, Dr. Bugna, and the podiatrists, Drs. Mollberg and Pulig, were erroneously disregarded by Dr. Cabayan.

Defendant petitioned for reconsideration in Case Nos. WCK 041016, OAK 225232, WCK 041017 and WCK 039110. In Case No. WCK 041017, it was found that while employed as a jailer on November 13, 1991, applicant sustained an industrial injury in the form of a human bite, but did not sustain an industrial injury to his psyche from this incident; that reasonable testing for HIV virus may be necessary in the future; and that jurisdiction is reserve to determine such benefits as may be come due applicant if he should become known to have the HIV virus.

In Case No. OAK 225232, it was found that applicant while employed as a jailer/correctional officer from 1989 to June 26, 1997 sustained industrial injury to his psyche; that he incurred reasonable self-procured medical costs; that he did not sustain any temporary or permanent disability; and that applicant is in need of further medical treatment.

In Case No. WCK 41016, it was found that applicant while employed on February 27, 1997 sustained industrial injury to his gastrointestinal system; that the injury caused temporary disability less EDD payments; that applicant incurred self-procured medical treatment expense; that applicant is not in need of further medical treatment; and that applicant did not sustain permanent disability.

Defendant contends that (1) in Case No. WCK 41017, the WCJ erred in reserving jurisdiction to determine benefits in the event that applicant tests positive for HIV virus; (2) in WCK 41017, the WCJ erred in providing applicant with reasonable future testing for HIV virus because substantial evidence does not justify a finding that further testing is required when applicant tested negatively from the time of the November 13, 1991 incident to the time of trial; (3) in

Case No. OAK 225232 (the amended cumulative injury through June 26, 1997 to applicant's psyche) the order amending the application to conform to proof and changing the date of injury from a specific injury of February 15, 1995 to a cumulative injury through June 26, 1997 is not supported by substantial evidence; (4) in OAK 225232, applicant has failed to meet the new and higher standards of a psychiatric injury, set forth in Labor Code section 3208.3 and the actions by the defendant are good faith personnel actions; (5) in Case No. WCK 41016, the February 27, 1997 gastrointestinal injury, substantial evidence does not justify the WCJ's finding of temporary disability and liability for EDD payments or self-procured medical treatment expense, where the alleged stress causing the injuries was not industrial because applicant failed to meet the higher threshold of Labor Code section 3208.3; and (7) in Case No. WCK 39110, the WCJ erred in finding injury, temporary disability less reimbursement to EDD, and reimbursement of self-procured medical treatment costs, because substantial evidence justifies a finding there was no injury.

Based on our review of the record, and for the reasons stated by the WCJ in his report and recommendation of December 8, 1999, which we adopt and incorporate by reference herein, we will grant reconsideration, solely to amend the decision in Case No. WCK 39110 to allow further medical care for applicant's industrial knee condition. In all other respects, we adopt and affirm the WCJ's decision, for the reasons stated in its report and recommendation.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Award in Case No. 39110 be, and the same hereby is GRANTED

IT IS FURTHER ORDERED as the Appeals Board's decision after reconsideration that the Findings and Award in

Case No. WCK 39110 he, and the same is AMENDED to read as follows:

FINDING OF FACT

4. Applicant is in need of further medical treatment to his left knee.

AWARD

AWARD IS MADE in favor of JUDGE JAY RICE and against CITY OF OAKLAND of:

(a) Temporary total disability at maximum $490.00 per week from July 10, 1997 to May 1, 1998 less the EDD lien, which is allowed in an amount to be adjusted.

(b) Reimbursement of self-procured medical expense, in an amount to he adjusted by the parties, with jurisdiction.

(c) Further medical treatment to the left knee.

IT IS FURTHER ORDERED that the Findings and Award in Case Nos. OAK 213148, WCK 41017, OAK 252232, and WCK 41016 he, and the same hereby are, ADOPTED and AFFIRMED

IT IS FURTHER ORDERED that this case be, and the same hereby are ordered RETURNED to the trial level for any other further proceedings and decision.

WORKERS' COMPENSATION APPEALS BOARD

"s/COLLEEN S. CASEY"

I CONCUR
"s/ ILLEGIBLE" WCAB JUDGE
"s/ ILLEGIBLE" WCAB JUDGE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
JAN 14 2000

SERVICE BY MAIL ON SAID DATE TO AL.L PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS.

SEAL WORKERS COMPENSATION APPEALS BOARD

December 8, 1999

JUDGE RICE
v.
CITY OF OAKLAND and
FIRM SOLUTIONS

WCAB Case Nos. **OAK 0225232;** OAK 0213148; WCK 0041016; WCK 0041017; WCK 0039110

RICHARD W. KIRBY
WORKERS' COMPENSATION JUDGE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Introduction

Applicant worked as a correctional officer for the City of Oakland between 1989 and October 26, 1997. By a decision of November 2, 1999, applicant's five pending claims were addressed. Four claims resulted in benefits and one claim resulted in no benefits. Both applicant and defendant have sought the Board's review of the multiple findings. As of this date, applicant has filed an answer to defendant's petition. In addition, applicant has requested a decision on his Labor Code section 132(a) claim which was inadvertently omitted from the MSC statement of issues and not addressed in the recent decision.

The five files involved are: (1) OAK 021348 with reference to applicant's continuing trauma to his left knee ending February 1993 which is the subject of Applicant's Petition to Reopen based on newly discovered evidence and fraud; (2) WCK 0041017 which is applicant's admitted November 13, 1991 injury from a human bite; (3) OAK 0225232 which was a specific February 15,1995 stress claim amended in the decision according to proof to show a

cumulative trauma claim between 1989 and applicant's last date of work on June 26, 1997; (4) WCK 0041016 is a specific gastro-intestinal injury dated February 17, 1997; and (5) WCK 0039110 is a specific June 12, 1997 left knee claim. Between applicant's petition and defendant's petition, the Board is requested to review all five claims.

The parties filed their petitions based on the record which included summaries of evidence taken during the multiple trial days. At applicant's request, transcripts are now available and supplemental pleadings from the parties may be forthcoming based on those transcripts. Both parties have provided extensive arguments based on their respective views of the conflicting evidence. Since these are voluminous files, the trial decision tried as far as possible to stress either uncontested facts or those supported by multiple sources. Throughout the proceedings, the allegations of misconduct by applicant against his employer and its vigorous defense against those allegations left the Board with a difficult task in determining the facts as well as applying the law.

Trial Decision

The initial portion of the opinion on decision summarizes my understanding of the facts:

> "Applicant is representing himself. He worked as a correctional officer for the City of Oakland between 1989 and October 26, 1997. He has multiple workers' compensation claims pending for both admitted and disputed injuries. He also has brought both State and Federal actions against his employer for claims stemming from his employment. He has fully litigated one workers' compensation claim for a continuing trauma to his left knee ending in February 1993 OAK 0213148 and now seeks to reopen that claim in addition to having his remaining claims decided. An extensive record has been developed and in an effort to organize the claims on a chronological

basis, it is thought helpful to provide a brief summary of the facts.

"Applicant is an African-American. He is married with two sons. He was raised in Brooklyn, New York. He graduated from high school in 1974. After some work at the post office, he joined the Navy for over eight years. He was in the See Bees where he played on a Navy basketball team. Unfortunately, he suffered a right knee injury in 1978 while playing basketball. It required surgery at Keesler AFB in Biloxi. Mississippi. Following the surgery, applicant was able to continue in the Navy although upon leaving the service, he had some disability consisting a history of migraines and chronic rhinitis in addition to his knee claim.

"Applicant was involved in an automobile accident in 1985 which resulted in a back injury. The entire claim was settled for $10000.00. Between leaving the Navy and starting work with the City of Oakland, applicant had several other employments. In addition, he completed a two-year degree at Alameda College and a four-year degree at California State University at Hayward (1988) and correspondence degree from New York University in 1989. Applicant took classes while he was in the Navy and has taken classes since leaving the service toward a master in business administration.

"Just before starting with the City of Oakland, applicant was able to run 3 miles a day, 5 days a week. He had no known work disability in 1989 other than those documented above. He did wear orthotic devices in his shoes as a result of the earlier knee injury.

'Two early incidents occurred in connection with applicant's job which he believes are important. The first was the admitted injury of November 13, 1991. Applicant attempted to break up a rape by one prisoner of another and was bitten by the aggressor in the forearm and near his penis. The skin was broken in the arm but not near the penis. While treatment was received, the aggressor inmate who had been placed in the jail by the Immigration and Naturalization Service was transferred out of the country. No report was made to the District Attorney about the incident nor was a request made for the District Attorney to obtain a HIV test on this inmate before he left the country.

"The second incident involves an off-duty marital dispute which involved applicant, his wife and another lady. Both women were Caucasians. The police were called and applicant paid for a broken fish tank. Applicant contends that the Oakland Police involvement was unnecessary and that the department's three-day suspension later reduced to one day suspension of him was racially motivated because the relationships were interracial.

"Given this background, applicants first litigated workers' compensation claim was filed in 1993 after he began to experience problems with his left knee. The claim was denied and litigated as will be discussed below. Applicant obtained surgery on the left knee through his private health care plan and used about nine months of sick leave and state disability benefits before returning to work. Because of his knee injury, applicant sought and was given a light duty job at the jail. He was assigned to the control desk which is outside the actual jail. In 1994, he sought to make this position permanent by availing himself of the Americans with Disability Act. His initial request was

to Lieutenant Anderson in November of 1994 and was unsuccessful. When he finally made the request in February of 1996 to Judy Jackson who is the American with Disability Act's coordinator, he was able to get Americans with Disability Act status but it did not completely satisfy his request.

"Applicant's concern about Americans with Disability Act status was colored by the denial of his industrial disability status for the left knee and from concerns that there were possible lay-offs of correctional officers in the offing. The City had budget problems and he received word that there may be lay-offs because of budgetary constraints. He was also asked to participate in a job re-classification survey. In March of 1996, applicant filed a grievance over a training assignment given to another correctional officer, Stacy Perry. In April, his supervisor, Lieutenant Green, told applicant that the department might have to reduce staff. At this point, he and others were also required to have a fitness for duty examinations. When he refused to voluntarily fill out the job survey he was given a direct order to do so by his then immediate supervisor. Sergeant Thurston Slade. Applicant recalls that Sergeant Slade yelled at him and that he experienced headache and his stomach bothered him as a result of the interview. When he filled out the job survey, he was told by Deputy Chief Jones that it was incorrect. By November 1996 when his deposition was being taken in the workers compensation case, applicant was taking medication for depression.

"Applicant was also trying to get his union to support him and in that effort had filed a Federal EEOC claim. Applicant's performance review through 1996 remained good.

"In 1997, applicant's physical and stress problems became more intense. Another fitness for duty exam was requested in March to verify his knee condition and in April, one was requested to verily his emotional status based on stress problems. Applicant kept on working. In April or May, an incident occurred where his clothing was missing from his locker at work. He grieved the item and through the union was able to obtain reimbursement for his loss.

"In the period before April 2, 1997, applicant let it be known that he intended and did testify before the county grand jury on the problems of understaffing at the jail. The understaffing required more expensive police officers to fill in at a higher police officer's wages to compensate for the understaffing. Generally, police officers were able to get overtime pay for the additional hours they put in covering at the jail because there were inadequate number of correctional officers. Applicant was particularly concerned that the police officers who supervised the jail were in a position to enhance the salaries and economic benefits of friends and associates in the department through this overtime pay. He was also concerned that correctional officers were threatened with layoffs or further job reclassifications to lower pay and salary. His position, which was a light-duty position, might be eliminated entirely. Applicant's supervisor, Lieutenant Green testified about the problem to the grand jury also. A policy decision needed to be made by the City whether the City wished to continue operating the jail or whether to turn the function over to the county. The question was of general interest and reported on in the press.

" In the Summer of 1997, both applicant's concerns and the department's concerns came into conflict. Both applicant's knee and emotional state required treatment. On June 4, 1997, applicant complained of vomiting blood and internal bleeding as a result of work stress. On June 5, 1997, he filled out a claim form for missing articles from his locker. On June 6, 1997, while meeting with his immediate supervisor, Sergeant Caranza in the sergeant's office, he experienced left knee symptoms when he was getting up from the chair which were sufficient for him to require medical care at the hospital emergency room. On June 12, 1997, the City requested applicant to see the city physician, Dr. Fred Blackwell on June 25. 1997. On the same day, applicant was seeing doctors at Summit Hospital for his knee and Dr. Gloria Vreeland for stress. Dr. Vreeland released him to return to work on June 16, 1997. Apparently, June 16 and 17 were his normal days off. On June 18, 1999, he was released to return to work by Dr. Blackwell with a scheduled orthopedic exam of July 10, 1997 and an exam for stress on June 25, 1997.

"On June 25. 1997, applicant saw Dr. Blackwell. This was a fitness for duty exam related to his stress claim. Dr. Blackwell informed applicant that he was going to refer applicant to a psychologist, Dr. Randall Smith in San Francisco. Applicant told Dr. Blackwell that he would not attend such an exam. Dr. Blackwell immediately notified the City of the applicant's response.

"On June 26, 1997. applicant met with his supervisor, Lieutenant Green. Lieutenant Green made it clear that applicant would not be able to return to work without a clearance from the City physician's office and that that would entail an exam with Dr. Smith. Applicant

notified Dr. Blackwell that he would keep exam with Dr. Smith. Dr. Blackwell believes that applicant was given Dr. Smith's telephone number that he was to make the appointment. Applicant disputes this and indicates that such exams were set by the City with written notice to him and transportation expenses provided pursuant to the union contract. At any rate, the appointment was set up for July 21, 1997 and applicant was notified of the appointment by Deputy Chief Sanchez with a letter dated July 7, 1997. In the meeting between applicant and Lieutenant Green on the 26th, Lieutenant Green declared that applicant was being put on an unpaid leave until he was cleared by Dr. Blackwell and Dr. Smith. The unpaid leave was the result of applicant's statement to Dr. Blackwell on the 25th that he would not keep the appointment. Applicant recalls telling Lieutenant Green that he hadn't refused the referral and that he would keep the appointment.

"The problem became more complicated when applicant failed to keep the appointment set for July 16, 1997 with Dr. Smith. On July 21, 1997, Lieutenant Green wrote applicant requesting an explanation and asking if there were any mitigating circumstances. The letter was sent by regular mail and by certified mail. The certified mail returned unclaimed. Applicant denied receiving the letter. On August 7, 1997, after Lieutenant Green participated in a meeting with other department officials, he telephoned applicant's wife at home and urged her to encourage applicant to keep the medical appointment as scheduled with Dr. Smith. About the same time, applicant's union representative told applicant to keep the medical exam. This was followed by a formal appointment letter by Deputy Chief David Krause dated August 21, 1997 to Mr. Rice. It informed applicant that he was required to see

Dr. Smith on September 2, 1997. The applicant contends that this letter did not reach him. Lieutenant Green recalls a telephone conversation with applicant on September 2nd in which he reminded the applicant of the appointment. Applicant denies the contact with Lieutenant Green on September 2nd. On September 26, 1997, Police Chief Krause recommended applicant be terminated and on October 26, 1997, applicant was terminated. Applicant thereafter began drawing state disability benefits. He retired effective October 26, 1997."

OAK 0213148 (CT through February 1993- Left Knee)

Applicant sought to reopen this claim from an adverse decision. His request was denied on the following analysis:

"On May 26. 1994, applicant, through his then attorney, Nancy Tavernit, Esq ., filed an application for benefits alleging a cumulative injury to his heels and left knee for the period ending February 1993. His employer denied the claim and provided no industrial benefits. The claim was fully litigated with an appeal to the California Supreme Court. The decision of the Workers' Compensation Administrative Law Judge Robert Laws that applicant did not sustain any injury as affirmed and unchanged by applicant' s appeals.

"On January 28, 1998, applicant filed a petition to reopen tins claim and alleged that newly discovered evidence obtained from the Veteran's Administration. Applicant has obtained Veteran's Administration records which confirmed that while applicant had treatment in 1978 and 1980 to his right knee, there was no treatment, surgery or significant disability to his left knee at that time and no treatment for either knee after 1982. He alleges that the subsequent

examinations in the service were negative for any right or left knee problems. He requests the matter be reopened because of this newly discovered evidence. The Board had relied on the opinion of Dr. Vatche Cabayan, M.D. to the effect that applicant's left knee problems were the result of preexisting and natural arthritic disease in both knees.

"Applicant's argument lacks merit because there was no showing that defendant had these records or that applicant or his counsel could not have obtained the records prior to Judge laws' decision. The subsequent records have been reviewed by Dr. Cabayan and he does not change his opinion. He remains of the opinion that applicant suffers from progressive arthritic disease without industrial component.

"Applicant has also alleged fraud and misconduct on the part of his employer. There is no convincing evidence for his allegation that his employer acted improperly with reference to his claim. Applicant's petition to reopen in Case No. OAK 0213148 must therefore he denied."

In his petition for reconsideration, applicant argues that the judge had insufficient understanding of the extensive record developed in this case before it was assigned to him. He points out the procedural actions taken to present his claim by his former counsel and refers to the trial before WCALJ Laws in 1996. Applicant was dissatisfied with attorney Nancv Tavernit's assumption of his case from Sharon Stokke (both of the Van Bourg Law Firm). He states that Nanny Tavernit did not request or obtain his Veteran's Administration records nor request the record to be held open for them. Upon receipt of an adverse decision from WCALJ Laws, Ms. Tavernit declined to file a petition for reconsideration and applicant was forced to act on his own

behalf. Applicant obtained the records well over a year after his trial.

In addition, applicant alleges the defendant hid and concealed a documentation of the injury by presenting false testimony of Sgt. Vincent Chan and Sgt. Ronald Davis with the full knowledge of Lt. Gregory Lowe. Finally, applicant argues that the city physician, Howard Ballinger, reported improperly to allow defendant to deny his claim. Based on these allegations, applicant asserts that every medical examination arranged by the defendant was preceded by "false, slanderous, malicious, misleading and inappropriate correspondence meant to interfere with a doctor's honest diagnosis.

Applicant then recounts his on-going difficulties with defendant's attorney restating the facts from his point of view for some 12 pages. In this portion of the petition, applicant stresses his perception of unfairness by his employers to jailers employed by the city and especially to African-American jailers. Applicant concludes by emphasizing his belief that the Board should have relied on doctors favorable to him rather than on Dr. Vatche Cabayan.

Applicants petition on this matter restates arguments made to the Board and Courts throughout his earlier appearance. The only new evidence produced was the Veterans Administration records and there was no showing That either applicant or his then attorneys could not have obtained them in advance of his trial before WCALJ Laws. His dissatisfaction with his prior counsel does not constitute good cause to reopen and retry his case.

WCAB CASE Nos. WCK 0041017 - (November 13, 1991 Human Bite) and OAK 0225232 (February 15. 1995 - Stress)

Applicant suffered a human bite at work. This is an admitted injury. It was addressed as follows:

"On September 25, 1995, applicant filed a claim

alleging an injury an injury to his psyche on February 15, 1995. At the time of this claimed injury, applicant was working. Attached to the application were Notice of Claim Forms (DWC-1) for both his November 13, 1991 human bite claim and a claim form alleging stress on "February 15, 1995." These claim forms were separated out so that the bite claim which was an admitted injury was given Board No. WCK 0041017 and OAK 0225232 became the stress claim for the date of injury February 15, 1995."

"In Case No. WCK 0041017, applicant raised concerns that the individual inmate who bit him might have transferred the HIV/AIDS virus to him. At this time, there is no evidence to that effect. However, because of the latency period for the HIV/AIDS is not known (no evidence was presented on the issue), the Board will expressly reserve jurisdiction to determine if such benefits might be due in the future and defendant will be ordered to provide applicant with testing at reasonable intervals to assure applicant that he has not contracted this disease from the incident of November 13, 1991. If he does contract HIV/AIDS then the Board will have to determine whether it is the result of this incident or some other cause.

Stress Aspect

"Applicant has also claimed that this incident has caused him stress resulting in injury to his psyche. The medical evidence consists of the opinions of Dr. Lawrence Petrakis, M.D. who reported on May 18, 1998 and notes that pages 12 and 13 the following:

> 'The history, in brief, is that of a forty-two year old former corrections officer for the City of Oakland who reports being bitten on the left

arm and in the region of the penis by an inmate on 11/13/91. The bite to the left arm broke the skin and the patient reports that after freeing himself from his assailant, he received care but not the sort of care that he had expected and anticipated. In short, the inmate in question has not been tested to determine the inmate's status or whether he carried the AIDS virus. He indicates that his supervisors did not respect him.

'While he reports a great deal of anger at the inmate and feeling that he could have been injured or killed, the patient did not go on to develop any particular problems in this direction, indicating that he never had problems in dealing with inmates or carrying out his work responsibilities with respect to being a corrections officer.

'Rather, after learning that the inmate had been deported, he filed lawsuits maintaining that he had been discriminated against and improperly treated by superiors not carrying out their responsibilities and having the inmate tested.

'Following this, he said that the work station became hostile. An investigation was undertaken and his behalf was undertaken by the person responsible for reporting the case which seemed unfair to the patient. He indicates that others in a similar position were treated differently with respect to follow up of the inmate or the perpetrator.

'An investigation indicated that his concerns were groundless.'

"Dr. Petrakis concludes that applicant does not have a psychiatric diagnosis at the time of the examination and defers the issue of whether his mental status in 1995 was such as to rise to the level of injury to the psyche. He notes that the trier-of-fact would have to make the important determination as to the fact and whether or not there was a good faith personnel issue to be decided.

"Dr. Donald Goldmacher's April 1, 1998 report to Judge Mason describes the same incident at page 6 including applicants complaints against the police department. Unfortunately. Dr. Goldmacher did not have all the medical records. He concludes that the total of applicants work experience at the City jail had an affect on applicant which appeared to support the finding of actual depression occurring after his termination. Dr. Goldmacher provides levels of disability and also notes that the good faith personnel action defenses would have to be determined by the Board.

"Based on my review of the file, I find that applicant did not sustain a psychiatric injury from the November 13, 1991 incident. As mentioned above, the Board is expressly reserving the jurisdiction to the possible long-term effects of HIV/AIDS transmission.

Defendant seeks the Board's review of the decision which allows applicant reasonable "check-ups" to determine if he was infected with the HIV virus by the human bite arguing this is not Piedmonte type case. The Board has broad powers in providing for the medical needs of an injured workman. The bite was an injury. The possible infection is real. The aggressor inmate should have been checked for HIV infection before he left the City jail. The City should not

be allowed to shirk its obligations where it made no effort to protect applicant by getting the aggressor tested.

OAK 0225232 (filed February 15, 1995 Stress - amended according to proof to show CT 1989 through 10/ /96)

Applicant has alleged stress at work on February 15, 1995 which caused him emotional injury. His claim was changed accordingly to proof to a continuing trauma claim of the following basis:

> "Applicant prepared DWC-1 on February 15, 1995 alleging injury to his psyche from stress. Defendant denied the claim and raised the affirmative defense of a good faith personnel action which removes certain job stresses from being compensable. The stresses which applicant showed throughout his employment all fall into two categories. For purposes of this claim, applicant entire employment is being considered and to that extent, the date of injury on the pleading is amended to show his full term of employment with the City of Oakland from1989 through October 1997. The first category which is not associated with personnel actions involves two alleged stressors. The first of these is applicant's emotional reaction to being bit by the inmate on November 13, 1991 in a situation which gave rise to the reasonable expectation that he might be exposed to AIDS. Applicant has alleged that the employer did not follow appropriate rules to secure the testing of the inmate for the AIDS virus. He has also asserted that the non-testing of this individual might also have reflected a racial bias against him.

"In February 1995, he sought medical treatment at Pacific Applied Psychology Associates. Therapist Phyllis Vince reported that applicant gave a history of depression for three years due to work. He specifically mentioned workers compensation issues. The issues

that he raised were the possible exposure to the AIDS virus from the bite in 1991 and his employers intervention into a marital dispute between himself and another lady and his wife. He also mentioned his concern over the way the claim for a leg injury was being handled. (See Applicants # 7). The third non personnel action stressor revolved around applicant's concern over the staffing pattern at the jail. He expressed concern about understaffing of jailers and the use of high paid police officers on overtime to fill jailer's shifts. His testimony in this regard to the grand jury while apparently in conformity with his supervisor. Lieutenant Green's testimony, was contrary to the opinion of the police chief. This public disapproval of a departmental policy was stressful to him. Police officers working in the jail at overtime pay can hardly be expected to welcome his characterization of them in a highly unfavorable light. I am not required to determine the correctness of the department's jail policy. I do believe that it caused the applicant stress and that such stress was not within the good faith personnel action defense. The other three stressors fall within the good faith personnel defense. These are: (1) the one day suspension as the result of the department's intervention in a marital dispute: (2) the requirement that he attend reasonable medical examinations and fitness for duty examinations; and (3) his attempt to secure American with Disability Act accommodations for his knee disability. In this regard, applicant sought the benefits of his union but received only limited help from the union. He was dissatisfied with the union effort and has taken independent action against the union as well as against his employer in other forums. Even assuming that all of the employer actions fell within the good faith personnel defense, the substantial involvement of the other two industrial

stressors would be sufficient to support Dr. Goldmacher's finding of injury. Dr. Goldmacher's opinion is buttressed by the therapist's records of Phyllis Vince.

"Dr. Petrakis, as noted above, also believes that in the context of 1995, applicant may have experienced an injury with a temporary consequences. Dr. Petrakis reviews the therapy notes at page 14 of his report. He notes that while applicant had emotional complaints and treatment, however, under the mental status exam of February 17. 1995, applicant was described as being essentially intact. The diagnosis was 296.21 (major depressive episodes - mild) as well as occupational problems.

"It is difficult to clearly state on this medical record whether applicant had an injury to his psyche resulting from work independent of the employer's affirmative defense of good faith personnel actions. At this point, it is important to assess applicant's credibility with regard to the issues of his emotional distress. I believe that psychological profiles prepared by Nathan J. Zilberg. Ph.D. for Dr. Petrakis and that of Dr. Mark Kimmel, Ph.D. for Dr. Goldmacher are important and they confirm my impression that applicant is truthful and wants to be vindicated with reference to his claims against the City. I am not sure that applicant fully understands the limits of the workers' compensation system to deal with daily irritants that employees may experience at work. In the area of psychiatric injury, there must be objective facts which support the reasonable interpretation of the worker that he or she has experienced emotional injury and these facts may not include those related to the good faith personnel actions.

"In the context of applicant's February 1995 claim, he experienced symptoms related to his unsuccessful attempt to get satisfaction from his employer over the failure to have the inmate tested for HIV. He also was dissatisfied with the results of the workers' compensation claim which was being litigated with regard to his left knee. These facts do not by themselves support a finding of industrial injury to the psyche even though treatment was sought.
"However, by the end of his employment. Dr Goldmacher's analysis that applicant's depression was related to his work seems correct. Dr. Petrakis allowed that if the applicant's perceptions are correct, then he did suffer an industrial injury. Defendant's assertion that all of the stress applicant experienced was part of their good faith personnel actions seems at first impression to be correct. On further analysis, there is a pattern of management judgments which collectively seem less than appropriate. Applicant has shown that his exposure to the possible HIV virus was not handled properly and that the inmate was allowed to leave the country before being tested. No report to the District Attorney was made and the federal initiate left the country before applicant's supervisors thought of having the inmate tested. Without assigning blame, this stressor does not follow within the normal good faith personnel defense. Applicant's belief that his personal life was intruded to by the department over the marital dispute may or may not have been something within the department's jurisdiction and the multiple exams may or may not have been appropriate. It is clear to me that while applicant has maintained that he did not receive notices of medical appointments with Dr. Smith, that from the documentary evidence, they were sent and that he was resisting the process. The union's representative

contacted him and encouraged him to keep the exam. This is considered important in making the finding that the applicant was not entirely cooperative with regard to the multiple exams which the defendant arranged. After reviewing both medical reports, I believe that the medical records support Dr. Goldmacher's conclusions and an injury to the psyche is found."

Benefits were awarded based on Dr. Goldmacher's opinion. Because the claim was amended through applicant's last date of work June 26, 1997, defendant now argues that the provisions of Labor Code section 3208.3 requires a higher threshold of injury and defendant is protected by the good faith personnel actions. Defendant argues that breaking applicant's stress situations into non-personnel and personnel actions should protect defendant since applicant must establish his claim by a preponderance (51%) of the evidence. I am not at all sure that the entire effects of "personnel actions" must be disregarded nor do I accept defendants position that applicants ADA claim must fall into the personnel action defense. Finally, defendant argues That it developed in the record serious challenges to applicant's credibility. Applicants answer which restates the code sections relative to the point and his arguments at pp. 6 through 44 detail his position that there was a psychiatric injury. Applicant appears to have done a good job as a correctional officer according to his job reviews. He was concerned about his knee disability and reductions in staff both of which he tried to address. He requested ADA accommodation for his knee disability and went to the grand jury with information about job staffing. He broke down over repeated employer exam, requests, and became a difficult employee to the point of having emotional injury. This was sufficiently outside the personnel action to constitute an injury. I would make no change to the benefits awarded.

WCK 0041016 (February 27, 1997 Gastrointestinal)

An injury to applicant's gastro-intestinal system was found on the following basis:

Injury

"Applicant claims an injury to his gastro-intestinal system as the result of stress. While the claim was denied by defendant the medical report Dr. Thomas E. Leonard. M.D. of October 28, 1998 confirms the injury. Injury is found as alleged.

Temporary Total Disability

"Periods of work due to this illness are industrial and are allowed less any EDD payments.

Self-Procured Medical Treatment

"Self-procured medical costs are allowed in an amount to be adjusted by the parties.

Further Medical Treatment

"Applicant received medical care according to Dr. Leonard. No further treatment is needed.

Permanent Disability/Apportionment

"Based on Dr. Leonard's opinion, applicant sustained no permanent disability.'

Defendant states this decision should be overturned because applicant as not met the statutory quantum of stress required. The record is clear that applicant was stressed from both personnel actions and non-personnel actions during a period when he was getting good job evaluations. He has met his burden of establishing by objective standards, stress of sufficient quantity to support Dr. Leonard's opinion.

WCK 0039110- Left Knee

Applicant claimed a specific knee injury while attending a meeting in his supervisor's office. As the opinion state:

> "Applicant claims a specific left knee injury on June 12, 1997. He alleges it occurred when he got up from a chair in Sergeant Caranza'a office. The incident is confirmed by the emergency room records at Summit Hospital and by the records of his treating physician according to Dr. Blackwell's July 2, 1997 report. It is described further on Dr. Cabayan's May 1, 1998 report at pp. 2-3 wherein he confirms further treatment including surgery on September 29, 1997. Dr. Cabayan states at page 9 that the mechanism of injury, i.e., getting out of a chair was not sufficient to alter the non-industrial progressive osteoarthritis condition. Dr. Qberlander confirmed to EDD that the disability was the result of "occupation" either as an "industrial accident" or as an occupational disease." (See EDD'd medical certificate dated January 29, 1998). The record contains a repeat of Dr. Cabayan's lengthy analysis of why the knee disability is not industrial and a short one line comment by the treater that it is industrial. Given the record. I am only able to find a temporary industrial aggravation on June 12, 1997. The benefits for such an aggravation are listed below."

Applicant seek the Board's review of the finding on the issue of further medical and permanent disability based on other medical opinion offered. The decision was based on Dr. Cabayan's opinion because he saw applicant both before and after the Veterans Administrator records became available:

Tempoary Total Disability and EDD Liens

'Temporary total disability is awarded for the period of the surgery of July 10, 1997 through May 1, 1998 at which time he was permanent and stationary.

Temporary total disability is not apportionable between industrial and non-industrial cases. The EDD lien is allowed during the period of overlap."

Self-Procured Medical Treatment

"The cost of self-procured medical treatment related to applicant's treatment by Dr. Oberlander is allowed together with prior treatment by Dr. Miranda between June 12. 1997 and July 10, 1997."

Further Medical Treatment

"Based on Dr. Cabayan's opinion, further care is non-industrial."

Permanent Disability/Apportionment

"Based on Dr. Cabayan's opinion, permanent disability is non-industrial."

The arguments presented by applicant do not change my conclusion that Dr. Cahayan's opinion is more reliable than those of Dr. Michael Oberlander, Dr. Miranda and Dr. Eric Bugna and podiatrist, Dr. William A. Puliz. I found applicant did have industrial injury to his knee. Upon further reflection, it does appear that since medical care is not apportionable it is reasonable to allow for further medical for applicant's knee. On the issue of permanent disability related to the knee. I still believe Dr. Cabayan' s opinion is most reliable because he saw applicant throughout the period and therefore could provide a reasoned opinion on the nature of the progression of applicant's knee condition since his first injuries while applicant was in the Navy.

RECOMMENDATION

1. Modify the decision in Case No. WCK 0039110 to allow for further medical care for the applicant's industrial knee condition.

2. In other respects deny both applicant and defendant's Petitions for Reconsideration.

Respectfully submitted,

"sRICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

Filed and Served by Mail on 12-08-1999, on All Persons Listed on the Official Address Record. By: "s Ruben Marquez"

November 2, 1999

STATE OF CALIFORNIA WORKERS COMPENSATION APPEALS BOARD

JUDGE RICE,
Applicant,
vs.
CITY OF OAKLAND and FIRM SOLUTIONS,
Defendant(s).

Case No(s). **OAK 0225232**; OAK 0213148; WCK 0041016; WCK 0041017; WCK 0039110

FINDINGS, AWARDS AND ORDERS

The above-entitled matter having been heard and regularly submitted, Richard W. Kirby, Workers Compensation judge, now makes his decision as follows:

WCAB CASE NO. OAK 213148

FINDING OF FACT
1. Applicant has not shown good cause to reopen his claim herein alleging a cumulative injury to his heels and left knee ending February 1993 while working as a jailer for the City of Oakland.
ORDER
Applicant's Petition to Reopen filed January 28, 1998 is DENIED.

WCAB CASE NO. WCK 0041017 (11/13/91 BITE INJURY)

FINDINGS OF FACT
1. Applicant, born January 18, 1956, while employed as a jailer on November 13, 1991 at Oakland, California by the

City of Oakland, lawfully uninsured for workers' compensation benefits, sustained injury arising out of and occurring in the course of his employment in the form of a human bite and did not sustain an industrial injury to his psyche from this incident.

2. Medical benefits were provided.

3. It is unknown whether the bite may have transmitted the human immune virus (HIV) which causes AIDS, although at this time applicant has tested negative for the virus.
4. Because the latency period of such transmission is not shown in the file, reasonable testing may be necessary in the future.
5. It is reasonable to reserve jurisdiction to the Board to determine such benefits as may be due applicant if he should become known to have the human immune virus.

ORDERS

(a) Defendant is ordered to provide applicant with reasonable future testing for the HIV virus.
(b) Applicant's claim for additional benefits is ordered off calendar.

WCAB CASE NO. OAK 0225232 (2-15-95 - STRESS)

FINDINGS OF FACT

1. Applicant, born January 18, 1956, while employed as a jailer/correctional officer by the City of Oakland, lawfully uninsured for workers compensation benefits between 1989 and June 26, 1997, sustained injury arising out of and occurring in the course of his employment to his psyche.
2. Applicant incurred reasonable self-procured medical

costs.

3. Applicant did not sustain any temporary disability as the result of this claim.

4. Applicant is in need of further medical treatment.

5. Applicant did not sustain permanent disability.

AWARD

AWARD IS MADE in favor of JUDGE RICE against the CITY OF OAKLAND of:

(a) The reasonable costs of self-procured medical care.

(b) Applicant is in need of further medical care to cure or relieve him from the effects of the injury herein.

ORDER

The date of injury in OAK 0225232 is amended to conform to proof by showing the date 1989 through June 26, 1997.

WCAB CASE NO. WCK 0041016 (2/27/97 - GASTRO-INTESTINAL CASE)

FINDINGS OF FACT

1. Applicant born January 18, 1956, while employed on February 27, 1997 at Oakland, California by the City of Oakland, lawfully uninsured for workers' compensation benefits, sustained injury arising out of and occurring in the course of his employment to his gastro-intestinal system.

2. The injury caused temporary total disability which is allowed less the EDD payments.

3. Applicant reasonably incurred expense for self-procured medical treatment in an amount to be adjusted by

the parties.
4. Applicant is not in need of further medical care to cure and relieve the effects of the injury herein.
5. Applicant did not sustain permanent disability from this injury.

AWARD

(a) Reimbursement of self-procured medical care to be adjusted by the parties.
(b) Temporary total disability at $490.00 per week for days lost from this injury less EDD payments in an amount to be adjusted by the parties.

WCAB CASE NO. WCK 0039110 (6/12/97 - LEFT KNEE)

FINDINGS OF FACT

1. Applicant, born January 18, 1956, while employed on June 12, 1997 as a correctional officer by the City of Oakland, lawfully uninsured for workers' compensation purposes, sustained injury arising out of and occurring in the course of his employment to his left knee.
2. The injury caused temporary total disability from July 10, 1997 to May 1. 1998.
3. Applicant reasonably incurred self- procured medical expense.
4. Applicant is not in need of further medical care from this injury.
5. Applicant did not sustain permanent disability from this injury.
6. The EDD is entitled to reimbursement of its lien for the period overlapping temporary total disability awarded herein.

AWARD

(a) Temporary total disability at maximum $490.00 per week from July 10, 1997 to May 1, 1998 less the EDD lien which is allowed in an amount to be adjusted.
(b) Reimbursement of self-procured medical expense, in an amount to be adjusted by the parties, with jurisdiction reserved.

"s/RICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

Filed and Served by Mail on 11/2/1999, on All Persons Listed on the Official Address Record.
By: "s/Ruben Marquez"

November 2, 1999

STATE OF CALIFORNIA WORKERS COMPENSATION APPEALS BOARD

JUDGE RICE,
Applicant,
vs.
CITY OF OAKLAND and FIRM SOLUTIONS,
Defendant(s).

WCAB Case No(s). **OAK 0225232**; OAK 0213148; WCK 0041016; WCK 0041017; WCK 0039110

RICHARD W. KIRBY
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

Applicant is representing himself. He worked as a correctional officer for the City of Oakland between 1989 and October 26, 1997. He has multiple workers' compensation claims pending for both admitted and disputed injuries. He also has brought both State and Federal actions against his employer for claims stemming from his employment. He has fully litigated one workers' compensation claim for a continuing trauma to his left knee ending in February 1993 (OAK 0213148) and now seeks to reopen that claim in addition to having his remaining claims decided. An extensive record has been developed and in an effort to organize the claims on a chronological basis, it is thought helpful to provide a brief summary of the facts.

Applicant is an African-American. He is married with two sons. He was raised in Brooklyn, New York. He graduated from high school in 1974. After some work at the

post office, he joined the Navy for over eight years. He was in the See Bees where he played on a Navy basketball team. Unfortunately, he suffered a right knee injury in 1978 while playing basketball. It required surgery at Keesler AFB in Biloxi. Mississippi. Following the surgery, applicant was able to continue in the Navy although upon leaving the service, he had some disability consisting a history of migraines and chronic rhinitis in addition to his knee claim.

Applicant was involved in an automobile accident in 1985, which resulted in a back injury. The entire claim was settled for $10000.00. Between leaving the Navy and starting work with the City of Oakland, applicant had several other employments. In addition, he completed a two-year degree at Alameda College and a four-year degree at California State University at Hayward (1988) and correspondence degree from New York University in 1989. Applicant took classes while he was in the Navy and has taken classes since leaving the service toward a master in business administration.

Just before starting with the City of Oakland, applicant was able to run 3 miles a day, 5 days a week. He had no known work disability in 1989 other than those documented above. He did wear orthotic devices in his shoes as a result of the earlier knee injury.

Two early incidents occurred in connection with applicant's job which he believes are important. The first was the admitted injury of November 13, 1991. Applicant attempted to break up a rape by one prisoner of another and was bitten by the aggressor in the forearm and near his penis. The skin was broken in the arm but not near the penis. While treatment was received, the aggressor inmate who had been placed in the jail by the Immigration and Naturalization Service was transferred out of the country. No report was made to the District Attorney about the incident nor was a request made for the District Attorney to obtain a HIV test on this inmate before he left the country.

The second incident involves an off-duty marital dispute which involved applicant, his wife and another lady. Both women were Caucasians. The police were called and applicant paid for a broken fish tank. Applicant contends that the Oakland Police involvement was unnecessary and that the department's three-day suspension later reduced to one day suspension of him was racially motivated because the relationships were interracial.

Given this background, applicants first litigated workers' compensation claim was filed in 1993 after he began to experience problems with his left knee. The claim was denied and litigated as will be discussed below. Applicant obtained surgery on the left knee through his private health care plan and used about nine months of sick leave and state disability benefits before returning to work. Because of his knee injury, applicant sought and was given a light duty job at the jail. He was assigned to the control desk which is outside the actual jail. In 1994, he sought to make this position permanent by availing himself of the Americans with Disability Act. His initial request was to Lieutenant Anderson in November of 1994 and was unsuccessful. When he finally made the request in February of 1996 to Judy Jackson who is the American with Disability Act's coordinator, he was able to get Americans with Disability Act status but it did not completely satisfy his request.

Applicant's concern about Americans with Disability Act status was colored by the denial of his industrial disability status for the left knee and from concerns that there were possible lay-offs of correctional officers in the offing. The City had budget problems and he received word that there may be lay-offs because of budgetary constraints. He was also asked to participate in a job re-classification survey. In March of 1996, applicant filed a grievance over a training assignment given to another correctional officer,

Stacy Perry. In April, his supervisor, Lieutenant Green, told applicant that the department might have to reduce staff. At this point, he and others were also required to have a fitness for duty examinations. When he refused to voluntarily fill out the job survey he was given a direct order to do so by his then immediate supervisor. Sergeant Thurston Slade. Applicant recalls that Sergeant Slade yelled at him and that he experienced headache and his stomach bothered him as a result of the interview. When he filled out the job survey, he was told by Deputy Chief Jones that it was incorrect. By November 1996 when his deposition was being taken in the workers compensation case, applicant was taking medication for depression.

Applicant was also trying to get his union to support him and in that effort had filed a Federal EEOC claim. Applicant's performance review through 1996 remained good.

In 1997, applicant's physical and stress problems became more intense. Another fitness for duty exam was requested in March to verify his knee condition and in April, one was requested to verily his emotional status based on stress problems. Applicant kept on working. In April or May, an incident occurred where his clothing was missing from his locker at work. He grieved the item and through the union was able to obtain reimbursement for his loss.

In the period before April 2, 1997, applicant let it be known that he intended and did testify before the county grand jury on the problems of understaffing at the jail. The understaffing required more expensive police officers to fill in at a higher police officer's wages to compensate for the understaffing. Generally, police officers were able to get overtime pay for the additional hours they put in covering at the jail because there were inadequate number of correctional officers. Applicant was particularly concerned that the police officers who supervised the jail were in a position to enhance the salaries and economic benefits of friends and associates in the department through this

overtime pay. He was also concerned that correctional officers were threatened with layoffs or further job reclassifications to lower pay and salary. His position, which was a light-duty position, might be eliminated entirely. Applicant's supervisor, Lieutenant Green testified about the problem to the grand jury also. A policy decision needed to be made by the City whether the City wished to continue operating the jail or whether to turn the function over to the county. The question was of general interest and reported on in the press.

In the Summer of 1997, both applicant's concerns and the department's concerns came into conflict. Both applicant's knee and emotional state required treatment. On June 4, 1997, applicant complained of vomiting blood and internal bleeding as a result of work stress. On June 5, 1997, he filled out a claim form for missing articles from his locker. On June 6, 1997, while meeting with his immediate supervisor, Sergeant Caranza in the sergeant's office, he experienced left knee symptoms when he was getting up from the chair which were sufficient for him to require medical care at the hospital emergency room. On June 12, 1997, the City requested applicant to see the city physician, Dr. Fred Blackwell on June 25. 1997. On the same day, applicant was seeing doctors at Summit Hospital for his knee and Dr. Gloria Vreeland for stress. Dr. Vreeland released him to return to work on June 16, 1997. Apparently, June 16 and 17 were his normal days off. On June 18, 1999, he was released to return to work by Dr. Blackwell with a scheduled orthopedic exam of July 10, 1997 and an exam for stress on June 25, 1997.

On June 25. 1997, applicant saw Dr. Blackwell. This was a fitness for duty exam related to his stress claim. Dr. Blackwell informed applicant that he was going to refer applicant to a psychologist, Dr. Randall Smith in San

Francisco. Applicant told Dr. Blackwell that he would not attend such an exam. Dr. Blackwell immediately notified the City of the applicant's response.

On June 26, 1997, applicant met with his supervisor, Lieutenant Green. Lieutenant Green made it clear that applicant would not be able to return to work without a clearance from the City physician's office and that that would entail an exam with Dr. Smith. Applicant notified Dr. Blackwell that he would keep exam with Dr. Smith. Dr. Blackwell believes that applicant was given Dr. Smith's telephone number that he was to make the appointment. Applicant disputes this and indicates that such exams were set by the City with written notice to him and transportation expenses provided pursuant to the union contract. At any rate, the appointment was set up for July 21, 1997 and applicant was notified of the appointment by Deputy Chief Sanchez with a letter dated July 7, 1997. In the meeting between applicant and Lieutenant Green on the 26th, Lieutenant Green declared that applicant was being put on an unpaid leave until he was cleared by Dr. Blackwell and Dr. Smith. The unpaid leave was the result of applicant's statement to Dr. Blackwell on the 25th that he would not keep the appointment. Applicant recalls telling Lieutenant Green that he hadn't refused the referral and that he would keep the appointment.

The problem became more complicated when applicant failed to keep the appointment set for July 16, 1997 with Dr. Smith. On July 21, 1997, Lieutenant Green wrote applicant requesting an explanation and asking if there were any mitigating circumstances. The letter was sent by regular mail and by certified mail. The certified mail returned unclaimed. Applicant denied receiving the letter. On August 7, 1997, after Lieutenant Green participated in a meeting with other department officials, he telephoned applicant's wife at home and urged her to encourage applicant to keep the medical appointment as scheduled with Dr. Smith. About the same time, applicant's union representative told

applicant to keep the medical exam. This was followed by a formal appointment letter by Deputy Chief David Krause dated August 21, 1997 to Mr. Rice. It informed applicant that he was required to see Dr. Smith on September 2, 1997. The applicant contends that this letter did not reach him. Lieutenant Green recalls a telephone conversation with applicant on September 2nd in which he reminded the applicant of the appointment. Applicant denies the contact with Lieutenant Green on September 2nd. On September 26, 1997, Police Chief Krause recommended applicant be terminated and on October 26, 1997, applicant was terminated. Applicant thereafter began drawing state disability benefits. He retired effective October 26, 1997.

WCAB CASE No. OAK 0213148 (CT through February 1993- Left Knee)

On May 26. 1994, applicant, through his then attorney, Nancy Tavernit, Esq ., filed an application for benefits alleging a cumulative injury to his heels and left knee for the period ending February 1993. His employer denied the claim and provided no industrial benefits. The claim was fully litigated with an appeal to the California Supreme Court. The decision of the Workers' Compensation Administrative Law Judge Robert Laws that applicant did not sustain any injury as affirmed and unchanged by applicant' s appeals.

On January 28, 1998, applicant filed a petition to reopen tins claim and alleged that newly discovered evidence obtained from the Veteran's Administration. Applicant has obtained Veteran's Administration records which confirmed that while applicant had treatment in 1978 and 1980 to his right knee, there was no treatment, surgery or significant disability to his left knee at that time and no

treatment for either knee after 1982. He alleges that the subsequent examinations in the service were negative for any right or left knee problems. He requests the matter be reopened because of this newly discovered evidence. The Board had relied on the opinion of Dr. Vatche Cabayan, M.D. to the effect that applicant's left knee problems were the result of preexisting and natural arthritic disease in both knees.

Applicant's argument lacks merit because there was no showing that defendant had these records or that applicant or his counsel could not have obtained these records prior to Judge laws' decision. The subsequent records have been reviewed by Dr. Cabayan and he does not change his opinion. He remains of the opinion that applicant suffers from progressive arthritic disease without industrial component.

Applicant has also alleged fraud and misconduct on the part of his employer. There is no convincing evidence for his allegation that his employer acted improperly with reference to his claim. Applicant's petition to reopen in Case No. OAK 0213148 must therefore he denied.

WCAB CASE Nos. WCK 0041017 – (November 13, 1991 Human Bite) and OAK 0225232 (February 15. 1995 – Stress)

On September 25, 1995, applicant filed a claim alleging an injury an injury to his psyche on February 15, 1995. At the time of this claimed injury, applicant was working. Attached to the application were Notice of Claim Forms (DWC-1) for both his November 13, 1991 human bite claim and a claim form alleging stress on "February 15, 1995." These claim forms were separated out so that the bite claim which was an admitted injury was given Board No. WCK 0041017 and OAK 0225232 became the stress claim for the date of injury February 15, 1995.

WCAB Case No. WCK 0041017 (11/13/91 Bite)

In Case No. WCK 0041017, applicant raised concerns that the individual inmate who bit him might have transferred the HIV/AIDS virus to him. At this time, there is no evidence to that effect. However, because of the latency period for the HIV/AIDS is not known (no evidence was presented on the issue), the Board will expressly reserve jurisdiction to determine if such benefits might be due in the future and defendant will be ordered to provide applicant with testing at reasonable intervals to assure applicant that he has not contracted this disease from the incident of November 13, 1991. If he does contract HIV/AIDS then the Board will have to determine whether it is the result of this incident or some other cause.

Stress Aspect

Applicant has also claimed that this incident has caused him stress resulting in injury to his psyche. The medical evidence consists of the opinions of Dr. Lawrence Petrakis, M.D. who reported on May 18, 1998 and notes that pages 12 and 13 the following:

> 'The history, in brief, is that of a forty-two year old former corrections officer for the City of Oakland who reports being bitten on the left arm and in the region of the penis by an inmate on 11/13/91. The bite to the left arm broke the skin and the patient reports that after freeing himself from his assailant, he received care but not the sort of care that he had expected and anticipated. In short, the inmate in question has not been tested to determine the inmate's status or whether he carried the AIDS virus. He indicates that his supervisors did not respect him.

'While he reports a great deal of anger at the inmate and feeling that he could have been injured or killed, the patient did not go on to develop any particular problems in this direction, indicating that he never had problems in dealing with inmates or carrying out his work responsibilities with respect to being a corrections officer.

'Rather, after learning that the inmate had been deported, he filed lawsuits maintaining that he had been discriminated against and improperly treated by superiors not carrying out their responsibilities and having the inmate tested.

'Following this, he said that the work station became hostile. An investigation was undertaken and his behalf was undertaken by the person responsible for reporting the case which seemed unfair to the patient. He indicates that others in a similar position were treated differently with respect to follow up of the inmate or the perpetrator.

'An investigation indicated that his concerns were groundless.'

"Dr. Petrakis concludes that applicant does not have a psychiatric diagnosis at the time of the examination and defers the issue of whether his mental status in 1995 was such as to rise to the level of injury to the psyche. He notes that the trier-of-fact would have to make the important determination as to the fact and whether or not there was a good faith personnel issue to be decided.

Dr. Donald Goldmacher's April 1, 1998 report to Judge Mason describes the same incident at page 6 including applicants complaints against the police department.

Unfortunately. Dr. Goldmacher did not have all the medical records. He concludes that the total of applicants work experience at the City jail had an affect on applicant which appeared to support the finding of actual depression occurring after his termination. Dr. Goldmacher provides levels of disability and also notes that the good faith personnel action defenses would have to be determined by the Board.

Based on my review of the file, I find that applicant did not sustain a psychiatric injury from the November 13, 1991 incident. As mentioned above, the Board is expressly reserving the jurisdiction to the possible long-term effects of HIV/AIDS transmission.

WCAB Case No. OAK 0225232 (2/15/95/ Stress Claim)- Amended To Show CT Claim)

Applicant prepared DWC-1 on February 15, 1995 alleging injury to his psyche from stress. Defendant denied the claim and raised the affirmative defense of a good faith personnel action which removes certain job stresses from being compensable. The stresses which applicant showed throughout his employment all fall into two categories. For purposes of this claim, applicant entire employment is being considered and to that extent, the date of injury on the pleading is amended to show his full term of employment with the City of Oakland from1989 through October 1997. The first category which is not associated with personnel actions involves two alleged stressors. The first of these is applicant's emotional reaction to being bit by the inmate on November 13, 1991 in a situation which gave rise to the reasonable expectation that he might be exposed to AIDS. Applicant has alleged that the employer did not follow appropriate rules to secure the testing of the inmate

for the AIDS virus. He has also asserted that the non-testing of this individual might also have reflected a racial bias against him.

In February 1995, he sought medical treatment at Pacific Applied Psychology Associates. Therapist Phyllis Vince reported that applicant gave a history of depression for three years due to work. He specifically mentioned workers compensation issues. The issues that he raised were the possible exposure to the AIDS virus from the bite in 1991 and his employers intervention into a marital dispute between himself and another lady and his wife. He also mentioned his concern over the way the claim for a leg injury was being handled. (See Applicants # 7). The third non personnel action stressor revolved around applicant's concern over the staffing pattern at the jail. He expressed concern about understaffing of jailers and the use of high paid police officers on overtime to fill jailer's shifts. His testimony in this regard to the grand jury while apparently in conformity with his supervisor. Lieutenant Green's testimony, was contrary to the opinion of the police chief. This public disapproval of a departmental policy was stressful to him. Police officers working in the jail at overtime pay can hardly be expected to welcome his characterization of them in a highly unfavorable light. I am not required to determine the correctness of the department's jail policy. I do believe that it caused the applicant stress and that such stress was not within the good faith personnel action defense. The other three stressors fall within the good faith personnel defense. These are: (1) the one day suspension as the result of the department's intervention in a marital dispute: (2) the requirement that he attend reasonable medical examinations and fitness for duty examinations; and (3) his attempt to secure American with Disability Act accommodations for his knee disability. In this regard, applicant sought the benefits of his union but received only limited help from the union. He was dissatisfied with the union effort and has taken independent

action against the union as well as against his employer in other forums. Even assuming that all of the employer actions fell within the good faith personnel defense, the substantial involvement of the other two industrial stressors would be sufficient to support Dr. Goldmacher's finding of injury. Dr. Goldmacher's opinion is buttressed by the therapist's records of Phyllis Vince.

Dr. Petrakis, as noted above, also believes that in the context of 1995, applicant may have experienced an injury with a temporary consequences. Dr. Petrakis reviews the therapy notes at page 14 of his report. He notes that while applicant had emotional complaints and treatment, however, under the mental status exam of February 17. 1995, applicant was described as being essentially intact. The diagnosis was 296.21 (major depressive episodes - mild) as well as occupational problems.

It is difficult to clearly state on this medical record whether applicant had an injury to his psyche resulting from work independent of the employer's affirmative defense of good faith personnel actions. At this point, it is important to assess applicant's credibility with regard to the issues of his emotional distress. I believe that psychological profiles prepared by Nathan J. Zilberg. Ph.D. for Dr. Petrakis and that of Dr. Mark Kimmel, Ph.D. for Dr. Goldmacher are important and they confirm my impression that applicant is truthful and wants to be vindicated with reference to his claims against the City. I am not sure that applicant fully understands the limits of the workers' compensation system to deal with daily irritants that employees may experience at work. In the area of psychiatric injury, there must be objective facts which support the reasonable interpretation of the worker that he or she has experienced emotional injury and these facts may not include those related to the good faith personnel actions.

In the context of applicant's February 1995 claim, he experienced symptoms related to his unsuccessful attempt to get satisfaction from his employer over the failure to have the inmate tested for HIV. He also was dissatisfied with the results of the workers' compensation claim which was being litigated with regard to his left knee. These facts do not by themselves support a finding of industrial injury to the psyche even though treatment was sought.

However, by the end of his employment. Dr Goldmacher's analysis that applicant's depression was related to his work seems correct. Dr. Petrakis allowed that if the applicant's perceptions are correct, then he did suffer an industrial injury. Defendant's assertion that all of the stress applicant experienced was part of their good faith personnel actions seems at first impression to be correct. On further analysis, there is a pattern of management judgments which collectively seem less than appropriate. Applicant has shown that his exposure to the possible HIV virus was not handled properly and that the inmate was allowed to leave the country before being tested. No report to the District Attorney was made and the federal initiate left the country before applicant's supervisors thought of having the inmate tested. Without assigning blame, this stressor does not follow within the normal good faith personnel defense. Applicant's belief that his personal life was intruded to by the department over the marital dispute may or may not have been something within the department's jurisdiction and the multiple exams may or may not have been appropriate. It is clear to me that while applicant has maintained that he did not receive notices of medical appointments with Dr. Smith, that from the documentary evidence, they were sent and that he was resisting the process. The union's representative contacted him and encouraged him to keep the exam. This is considered important in making the finding that the applicant was not entirely cooperative with regard to the multiple exams which the defendant arranged. After reviewing both medical

reports, I believe that the medical records support Dr. Goldmacher's conclusions and an injury to the psyche is found.

Temporary Total Disability

There is no showing applicant's emotional injury ever produced any temporary total disability. He was able to do the job of a jailer from an emotional standpoint. His temporary total disability was due to a physical limitation of his knee.

Self-Procured Medical Treatment

The cost of self-procured medical is allowed in an amount to be adjusted by the parties based on the reports of Dr. Petrakis and Dr. Goldmacher.

Further Medical Treatment

Applicant has seen mental health providers on a fairly regular basis. Dr. Goldmacher is of the opinion that such treatments were reasonable although he indicates that there were some limits on it. Further medical care is allowed. If there is a dispute as to the nature and the amount of the medical care that may be needed, the parties should look to Dr. Goldmacher for guidance.

Permanent Disability/Apportionment

Dr. Goldmacher listed factors of permanent disability in 1998. Applicant has not returned to work. This is not because of his psyche injury. The factors of permanent disability in Dr. Goldmacher's report of April 1, 1998 are found at pages 6 and 7. The work functions rates for a slight disability as follows:

1.4 –8% - 49J – 14 –14.

Dr. Goldmacher's opinion on apportionment indicates that his disability was the same slight disability. The net effect of Dr. Goldmacher's opinion is to agree with Dr. Petrakis that there is no present industrial psychiatric disability for which permanent disability benefits can be awarded.

WCK 0041016 (February 27, 1997 Gastrointestinal)

Applicant claims an injury to his gastro-intestinal system as the result of stress. While the claim was denied by defendant the medical report Dr. Thomas E. Leonard. M.D. of October 28, 1998 confirms the injury. Injury is found as alleged.

Temporary Total Disability

Periods of work due to this illness are industrial and are allowed less any EDD payments.

Self-Procured Medical Treatment

Self-procured medical costs are allowed in an amout to be adjusted by the parties.

Further Medical Treatment

Applicant received medical care according to Dr. Leonard. No further treatment is needed.

Permanent Disability/Apportionment

Based on Dr. Leonard's opinion, applicant sustained no permanent disability.'

WCAB Case No. WCK 0039110 (6/12/97 - Left Knee)

Applicant claims a specific left knee injury on June 12, 1997. He alleges it occurred when he got up from a chair in Sergeant Caranza'a office. The incident is confirmed by the emergency room records at Summit Hospital and by the records of his treating physician according to Dr. Blackwell's

July 2, 1997 report. It is described further on Dr. Cabayan's May 1, 1998 report at pp. 2-3 wherein he confirms further treatment including surgery on September 29, 1997. Dr. Cabayan states at page 9 that the mechanism of injury, i.e., getting out of a chair was not sufficient to alter the non-industrial progressive osteoarthritis condition. Dr. Qberlander confirmed to EDD that the disability was the result of "occupation" either as an "industrial accident" or as an occupational disease." (See EDD'd medical certificate dated January 29, 1998). The record contains a repeat of Dr. Cabayan's lengthy analysis of why the knee disability is not industrial and a short one line comment by the treater that it is industrial. Given the record. I am only able to find a temporary industrial aggravation on June 12, 1997. The benefits for such an aggravation are listed below."

Tempoary Total Disability and EDD Liens

Temporary total disability is awarded for the period of the surgery of July 10, 1997 through May 1, 1998 at which time he was permanent and stationary. Temporary total disability is not apportionable between industrial and non-industrial cases. The EDD lien is allowed during the period of overlap.

Self-Procured Medical Treatment

The cost of self-procured medical treatment related to applicant's treatment by Dr. Oberlander is allowed together with prior treatment by Dr. Miranda between June 12. 1997 and July 10, 1997."

Further Medical Treatment

Based on Dr. Cabayan's opinion, further care is non industrial."

Permanent Disability/Apportionment

Based on Dr. Cabayan's opinion, permanent disability is non-industrial."

"sRICHARD W. KIRBY"
WORKERS' COMPENSATION JUDGE

CALIFORNIA CONSTITUTION
ARTICLE 14
LABOR RELATIONS SEC. 4.

The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party.
.... and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government.

Applicant's February 8, 1998
Labor Code 132a Pleaded Claim

"COMES NOW, JUDGE J. RICE, applicant herein and claiming benefits against the employer City of Oakland for discrimination benefits pursuant to California Labor Code Section 132(a) alleges as follows:

I Applicant while employed by City of Oakland as a jailer, sustained stress caused by, and within in the scope of his employment.

II Applicant filed an Employee's Claim for Workers' Compensation Benefits, and an Application to Adjudicate Claim with the Board against the City of Oakland for the above stated stress injury.

III On or about April 4,1997, applicant was directed by the City of Oakland to be examined by the City Physician, Dr. Fred Blackwell for a fitness for duty examination for the above stress related injury.

IV On or about April 15, 1997, Dr. Fred Blackwell examined applicant, and cleared applicant to return to duty.

V On or about June 25, 1997 the City of Oakland caused its City Physician to maliciously and with ill will revoke his April 15, 1997 fitness for duty clearance, and demanded, ordered Dr. Fred Blackwell have applicant examined by a Dr. Randall Smith for a psychiatric evaluation.

VI Applicant informed the City of Oakland that pursuant to a lawful order of the Honorable George Mason of the Workers' Compensation Appeals Board that found that the City of Oakland had illegally subjected applicant to several prior psychiatric evaluations according the City Charter, and that the City of Oakland was prohibited from subjecting applicant to submit to additional psychiatric evaluations.

VII On or about June 26, 1997, the City of Oakland relieved applicant from his duties, and singled him out for an insubordination charge, and placed applicant on an unlawful indefinite unauthorized leave according to the City Charter until applicant submitted to a psychiatric examination by Dr.

Randall Smith notwithstanding the order of Honorable George Mason.

VIII On or about October 10, 1997, the Honorable George Mason, and Workers' Compensation Appeals Board directed applicant, and City of Oakland to conduct a psychiatric evaluation by an Agreed Qualified Medical Examiner, Lawrence Petrakis, M.D.

IX On October 24, 1997, notwithstanding the order of Honorable George Mason, and the City of Oakland's agreement to conduct a psychiatric examination by an agreed qualified medical examiner in compliance with the jurisdiction of Worker's Compensation Appeals Board, the applicant was fired allegedly for "insubordination" because the applicant had not submitted to an illegal psychiatric evaluation with Dr. Randall Smith.

X On June 26, 1997 the applicant was placed on unauthorized leave for being insubordinate to the City Physician as set out above notwithstanding the order of Honorable George Mason, and the City of Oakland Personnel Manual and Policies.

XI This was a malicious, spiteful application of the City of Oakland Personnel Manual and Policies because the applicant had in fact been examined by the City Physician on June 25, 1997, and that City Physician had in fact returned the applicant to regular duties, and that City Physician was going to schedule a psychiatric evaluation with Dr. Randall Smith as set out above.

XII Nevertheless being cleared by the City Physician to return to regular duties on June 25, 1997 and the applicant being cleared by his private personal physician to return to his regular duties, all in compliance with the City of Oakland Personnel Manual and Policies, defendant City of Oakland manipulated the rules and policies of the personnel manual to force the applicant into unauthorized leave pending a psychiatric evaluation from Dr. Randall Smith.

XIII The defendant, City of Oakland, thereafter manipulated, persuaded, coaxed the City Physician to say that the APP L-2)

applicant verbally rebuked, rebelled against the City Physican by refusing openly to accept an appointment with Dr. Randall Smith as set out above that in fact was never made, or existed.

XIIII The defendant manipulated the personnel manual to force the applicant into unauthorized leave of absent because that personnel manual by custom, and practice provides that the City Physician arrange, and set up future appointments, and thereafter mail the appointment schedule to the applicant, which the defendant intentionally failed to do in order to manipulate the personnel manual, and provide cover for forcing the applicant into unauthorized unpaid leave.

XV The defendant manipulated the personnel manual to force the applicant into unauthorized unpaid leave because that personnel manual and by custom, and practice, Gates McDonald, the defendant's insurer, arrange, and provide transportation costs, travel to the applicant prior to the schedule medical appointment, which defendant intentionally failed to do in order to manipulate the personnel manual, and conceal its plot from the insurer.

XVI Thereafter after discovering a loose end in its plot in that future medical appointments had to have been made in writing pursuant to the personnel manual, the defendant manipulated, coaxed, persuaded Lt. Anderson of Criminal Investigations, to conjure up, materialize, fabricate, contrive a concoction, tall tale that he called the applicant at home, and gave the applicant a direct order to attend a scheduled medical appointment with Dr. Randall Smith for a date on September 7, 1997, in fact the applicant never spoke to, or was contacted by Lt. Anderson.

XVII The defendant continued to manipulate the personnel manual, and collective bargaining agreement to hold the applicant into unauthorized unpaid leave by denying the applicant a fair, and full hearing according the collective bargaining agreement nevertheless applicant requested a

fair, and full hearing on numerous occasions to oppose, contest their actions.

XVIII The defendant manipulated the personnel manual, and collective bargaining agreement to deny the applicant a "Skelly Hearing" prior to his termination, a hearing that all city employees are entitled to as a matter of contract, and state law, and in fact no "Skelly Hearing" has occurred nevertheless applicant has requested a "Skelly Hearing".

XVIIII The defendant, City of Oakland, manipulated, persuaded, coaxed the applicant's union, SEIU 790, namely Leo Handy Jr., Margaret Cunningham, Union Representatives, to deny, spurn, delay, and destroy the applicants grievance rights, and in fact applicant's grievance in regards to the facts set out above by design, plan, and plot of SEIU 790, and defendant never proceed beyond the third step, meetings with the city, which to the applicant is 'Third Step Infinity". Forth Step is a fair, and full hearing with an independent arbitrator.

XX Applicant is informed and believes, and thereon alleges, that defendant's termination of applicant was nothing other than an attempt to discriminate against applicant for filing an application, and the adjudication for his workers' compensation benefits.

WHEREFORE, applicant respectfully requests that he be awarded the benefits provided by California Labor Code Section 132(a) including increased compensation, reinstatement and reimbursement for lost wages and work benefits caused by said defendant's act."

STIPULATIONS BY DEFENDANT

On March 17, 1999, before the Honorable Richard W. Kirby of the Workers' Compensation Appeals Board, defendant City of Oakland appearing by counsel, Jeffrey Grant, and in consultation with City Attorney, Stephen Q. Rowell stipulated that Petitioner had been medically and psychologically examined at the mandate of defendant City of Oakland by six (6) doctors on 2/23/98 by Dr. Lawrence T. Petrakis, and Dr. Nathan J. Zilberg, 3/30/95 by Dr. Randall Smith, 2/28/98 by Dr. Goldmacher, 12/3/97 by Dr. Mark Kimmel, and Dr. Thomas Leonard, and defendant City of Oakland further stipulated that in all cases, Petitioner was returned to work, able to perform his duties as a Correctional Officer for the City of Oakland.

Quoting from the trial transcript:

JUDGE KIRBY: So the answer I have to your question is that he's seen five or six doctors, including Sandra Smith and Randall Smith.

BY MR. BULLOCK: Q. Do you recall seeing a psychologist in 1997 in regards to the City of Oakland?

A. That's Correct.

Q. And was that doctor Dr. Mark Kimmel?

A. That's correct. K-i-m-m-e-l

Q. What type of doctor is he; do you recall?

A. Dr. Kimmel is a psychologist.

Q. Okay.

MR. GRANT: If it would speed matters up, we'll stipulate these are the reports that are our exhibits, and Dr. Kimmel and Dr. Goldmacher saw Mr. Rice together as part of a joint effort. Dr. Zilberg, Z-i-l-b-e-r-g

MR. BULLOCK: And Dr. Petrakis saw them together.

MR. GRANT: In terms of foundational and getting this information out, we'll stipulate that Dr. Leonard is a gastroenterologist.

MR. BULLOCK: These are all related to stress matters.
MR. GRANT: That's what they saw him for. Dr. Leonard is a gastroenterologist.
MR. BULLOCK: And they all returned him-- They all returned him to work. Would you stipulate to that?
MR. GRANT: Let me study that. Looking at Dr. Leonard's report--
MR. BULLOCK: Yes
MR. GRANT: --of August 18th, 1998, it says that he can certainly perform all of his duties as a correctional officer or in any other similar occupation.
JUDGE KIRBY: Dr. Petrakis says he has no psychiatric disability, and he's not a qualified injured worker.
MR. GRANT: Dr. Goldmacher is the last one we have to look at, too. In his report, Dr. Goldmacher states, "It is my opinion the claimant is not disabled from performing his usual and customary duties as a jailer. He's not a qualified injured worker and does not require vocational rehabilitation."
JUDGE KIRBY: Okay.